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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

NO. 617

W. YALE SMILEY,
Petitioner,

vs.

MIKE HOLM, as Secretary of State of the State of Minnesota, St. Paul, Minnesota,
Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE

SUPREME COURT OF THE STATE OF MINNESOTA

AND

BRIEF IN SUPPORT THEREOF

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SUBJECT INDEX.

	Page
Petition for Writ of Certiorari	1
Summary Satement of Matter Involved	1
Reasons Relied on for the Allowance of the Writ	4
Prayer for Writ	5
Brief in Support of Petition for Writ of Certiorari	7
I. The Opinion of the Courts Below	7
II. Jurisdiction	7
III. Statement of the Case	9
IV. Specifications of Error	10
V. Argument	10
Summary of Argument	10
Point A—House File 1456 Is Not the Action of the "Legislature"	12
Point B—House File 1456 Is Invalid Because It Does Not Comply with Existing Federal Constitutional Provisions and Statutory Regulations	23
Point C—House File 1456 Is Invalid Because It Is Unequal and Discriminatory	29
Point D—The Courts Have Power to Grant Relief	33
Conclusion	38
Appendix	
E—United States Constitution, Art. I, Sec. 4	39
F—United States Constitution—Amendment XIV	39
G—Table of Congressional Statutes on Apportionment	41
H—The Act of August 18, 1911 (37 St. L. 13)	42
I—Act of June 30, 1926 (44 St. L. 773)	44
J—Act of June 18, 1929 (46 St. L. 26)	46
K—Congressional Record, Excerpts from	48
L—Minnesota Constitution—Art. IV, Sec. 23	57
Art. IV, Sec. 2	57
M—The Legislative Power of the State of Minnesota	58
Organic Act of Minnesota, Sections 4, 6, 20	58
Minnesota Constitution—Art. IV, Sec. 11, 12	59
The Act Authorizing the State Government (1857)	60
The Act of Admission (1858)	60
N—State Legislative Districts	60
Organic Act of Minnesota (1849), Sec. 4	60
Act Authorizing State Government (1857), Sec. 3	61
Minnesota Constitution, Art. IV, Sections 23, 24	61
O—Congressional Districts	61
Organic Act (1849), Sec. 14	61
Act of Admission (1858), Sec. 2	62
P—Chapter 105, Laws of Minnesota 1931	62
Q—Table of Minnesota Districting Acts	63
R—Table of State Redistricting Method	63
S—Moran v. Bowley (Circuit Court Illinois, 1931)	65
T—Koenig v. Flynn (Sup. Ct. N. Y., 1931)	74

TABLE OF CASES CITED.

Beidler v. So. Car. Tax Comm'n (1930), 282 U. S. 1, 51 Sup. Ct. 54, 75 L. Ed. 69 37
Blodgett v. Silbermann (1928), 277 U. S. 1, 48 Sup. Ct. 410, 72 L. Ed. 749 38
Brooks v. State (1904), 162 Ind. 568, 70 N. E. 980 36
California v. Deseret Water Co. (1917), 243 U. S. 415, 37 Sup. Ct. 394, 61 L. Ed. 821 38
Carter v. Texas (1900), 177 U. S. 442, 20 Sup. Ct. 687, 44 L. Ed. 839. 37
City of Carlyle v. Nicolay (1929), 333 Ill. 562, 165 N. E. 211 19
Civil Rights Cases (1883), 109 U. S. 3, 3 Sup. Ct. 18, 27 L. Ed. 836. 30
Cumberland Coal Co. v. Board of Revision (1931), — U. S. —, 52 Sup. Ct. 48, 76 L. Ed. 131 9
Dowling, In Re (1916), 219 N. Y. 44, 113 N. E. 545 31
Doyle v. Hoffstadter, In Re (1931), 257 N. Y. 244, 177 N. E. 489.... 17
Fitzgerald v. Voorhis (1918), 222 N. Y. 494, 119 N. E. 106 19
Giddings v. Blacker (1892), 93 Mich. 1, 52 N. W. 944 36
Gieger v. First-Troy Nat'l Bank (1929), 30 Fed. (2nd), (C. C. A. 6) 7. 9
Graham v. Goodsell (1931), 282 U. S. 409 (425), 51 Sup. Ct. 186, 75 L. Ed. 415 28
Grossman, Ex Parte (1924), 267 U. S. 87 (119), 45 Sup. Ct. 232, 69 L. Ed. 527 20
Hadden v. Barney (1867), 72 U. S. 107 (113), 18 L. Ed. 518 25
Harriet State Bank v. Samels (1925), 164 Minn. 265 (273), 204 N. W. 938 9
Henderson's Tobacco (1870), 78 U. S. 652, 20 L. Ed. 235 28
Kennedy v. United States (1924), 265 U. S. 344, 44 Sup. Ct. 501, 68 L. Ed. 1045 28
Koenig v. Flynn (1931 Sup. Ct. N. Y.), Appendix T herein 21
La Rocca v. Flynn, In Re (1931), 257 N. Y. 5 (13), 177 N. E. 290.. 21
Maxwell v. Bugbee (1919), 250 U. S. 525 (537, 538), 40 Sup. Ct. 2, 63 L. Ed. 1124 30
McGrain v. Daugherty (1927), 273 U. S. 135 (174), 47 Sup. Ct. 319, 71 L. Ed. 580 20
Mitchell v. Clark (1884), 110 U. S. 633, 4 Sup. Ct. 170, 28 L. Ed. 279. 37
Moran v. Bowley (1931 Circuit Court Illinois), Appendix S herein. 22
Nixon v. Herndon (1927), 273 U. S. 536, 47 Sup. Ct. 446, 71 L. Ed. 759 8
Pacific States Tel. & Tel. Co. v. Oregon (1912), 223 U. S. 118, 32 Sup. Ct. 224, 56 L. Ed. 377 12
People v. Baldwin (1930), 341 Ill. 604, 174 N. E. 51 38
People v. Murray (1896), 149 N. Y. 367, 42 N. E. 584 21
People v. Palmer (1895), 12 Misc. 392, 33 N. Y. S. 1088; aff'd in 146 N. Y. 406 (2), 42 N. E. 543 (18) 19
People v. Supervisors (1893), 138 N. Y. 95, 33 N. E. 827 31
People v. Tremain (1929), 252 N. Y. 27, 168 N. E. 817 36
People v. Zimmerman (1928), 278 U. S. 63, 49 Sup. Ct. 61, 73 L. Ed. 63 9
Power Co. v. Saunders (1927), 274 U. S. 490 (493, 497), 47 Sup. Ct. 678, 71 L. Ed. 1165 31
Putnam v. Pyle (1930), — S. D. —, 232 N. W. 20 36
Rogers v. Hennepin County (1916), 240 U. S. 184, 36 Sup. Ct. 265, 60 L. Ed. 594 38
Santovincenzo v. Egan (1931), — U. S. —, 52 Sup. Ct. 81, 125 (2), 76 L. Ed. 135 9
Sherrill v. O'Brien (1907), 188 N. Y. 185, 81 N. E. 124 31
Sjoberg v. Security Savings & Loan Ass'n (1898), 73 Minn. 203 (212, 214), 75 N. W. 1116 19
Smiley v. Holm (1931), — Minn. —, 238 N. W. 494, 792 (1), Record Appendix D 7
Spokane Grain & Fuel Co. v. Lyttakee (1910), 59 Wash. 76, 109 Pac. 316 17

Standard Scales Co. v. Farrell (1919), 249 U. S. 571 (577), 39 Sup. Ct. 380, 63 L. Ed. 780 30
State v. Cunningham (1892), 81 Wisc. 440, 51 N. W. 724 36
State v. Cunningham (1892), 83 Wisc. 90, 53 N. W. 35 36
State v. Hildebrandt (1916), 241 U. S. 565, 36 Sup. Ct. 708, 60 L. Ed. 1172 5
State v. Polley (1910), 26 S. D. 5, 127 N. W. 848 ..... 8 62
State v. Smith (1920), 253 U. S. 221, 40 S. Ct. 495, 64 L. Ed. 871 13
State v. Sullivan (1912), 117 Minn. 329, 135 N. W. 748 20
State v. Zimmerman (1925), 187 Wisc. 180, 204 N. W. 803 (812) 19
Stiglitz v. Schardien (1931), — Ky. —, 40 S. D. (2nd) 315 36
Story v. Craig (1921), 231 N. Y. 33 (40), 131 N. E. 560 21
Stuart v. Chapman (1908), 104 M. E. 17, 70 Atl. 1069 17
Stuart v. Laird (1803), 5 U. S. (1 Cranch. 298), 299, 2 L. Ed. 115 20
Swafford v. Templeton (1902), 185 U. S. 487, 22 Sup. Ct. 783, 46 L. Ed. 1005 30
Van Huffel v. Harkelrode (1931), — U. S. —, 52 S. Ct. 115, — L. Ed. — 9

TABLE OF STATUTES CITED.

(In addition to those set out in the Appendix.)

United States Constitution, Art. I, Sec. 7 17
Section 237, Judicial Code (28 U. S. C. A., Sec. 344) 7
Equity Rule No. 29 9
Mason's Minnesota Code 1927, Sec. 9251 9

TEXTBOOKS AND ENCYCLOPEDIAS CITED.

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Dunnell's Minnesota Digest, Sec. 8952 20
R. C. L., Vol. 25, pp. 918, 920, 922; Secs. 169, 170, 171 28
Story on Const., Vol. I, Sec. 815 13

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931.

NO.....

W. YALE SMILEY,

Petitioner,

vs.

MIKE HOLM, as Secretary of State of the State of Minnesota, St. Paul, Minnesota, *Respondent.*

PETITION FOR WRIT OF CERTIORARI.

May It Please the Court:

The Petition of W. Yale Smiley respectfully shows to this Honorable Court:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Your petitioner, W. Yale Smiley, respectfully states that he is aggrieved by the judgment of the Supreme Court of the State of Minnesota rendered on the 17th day of November, 1931, in a suit, wherein this petitioner sought to have declared invalid all filings for nomination for the office of Representative in Congress designating a subdivision of the State of Minnesota as a congressional district, pursuant to House File 1456, Session Minnesota Legislature for the year 1931 (R., pp. 3-5, ff. 4-6), and to require him to return the fees received therefor; to enjoin the Secretary of State from accepting any more such filings; from giving notice of the holding of an election for the office of Representative in Congress from

such congressional districts; and for such other and further relief as might in the premises be proper.

Your petitioner is a resident, citizen, taxpayer, and elector of and in the Fourth Ward of the City of Minneapolis, County of Hennepin, and State of Minnesota.

The Federal and State Laws applicable are referred to briefly as follows:

Following the 1910 Federal Census Congress passed the Act of August 8, 1911 (Appendix H, p. 43) providing for the apportionment among the several states of four hundred thirty-five members of which Minnesota had ten.

Congress did not pass a reapportionment Act based on the 1920 Census; but anticipated the Census of 1930 in the Act of Congress of June 18, 1929 (Appendix J, p. 46). Pursuant to this Act the President of the United States transmitted to Congress his message and statement showing the returns of the 1930 Census (R., p. 2, f. 2) and thereupon and upon the failure of Congress to act the Clerk of the House of Representatives certified to the Governor of the State of Minnesota the fact that the State of Minnesota, under said Census, was entitled to nine representatives in Congress (R., pp. 2-3, f. 3) instead of ten.

The population of the State of Minnesota under the 1930 Census totalled 2,551,583. An equal division of the State into nine Congressional Districts would allocate 283,509 inhabitants to each Congressional District.

Prior to the attempted enactment of House File 1456, here challenged, the last districting of the State for congressional purposes, was made following the federal Census of 1910 by a Bill for an Act duly approved by the Governor, Chap. 315, Laws of Minnesota 1913. This Act was amended by Chap. 64, Laws of Minnesota 1929.

The Legislature of the State of Minnesota at its 1931

session, by a Bill for an Act which originated in the House of Representatives on April 15, 1931, known as H. F. 1456, undertook to redistrict the State into nine congressional districts. It passed that body and was sent to the Senate. After passage therein without amendment, the Bill was transmitted on the 20th day of April, 1931, to the Governor of the State for his approval. Thereupon the Governor vetoed the Bill and on the same day returned it to the House accompanied by his reasons for such veto (R., pp. 5-6, ff. 6-7).

On April 22, 1931, the House of Representatives, without according the Senate further opportunity to act thereon, alone adopted the resolution set out in paragraph twelve of the petition (R., p. 7, f. 8) and on the same day adjourned *sine die*.

Pursuant to this resolution, House File 1456 was deposited in the office of the Secretary of State on April 27, 1931, and was by him received and filed as valid legislation. Thereafter, he received and accepted the filing fee of a candidate for election as Representative in Congress from one of the congressional districts purported to be established by said House File 1456.

The redistricting attempted in House File 1456 did not provide for an equal, or nearly equal, population in each of the nine districts. There is a difference of 115,904 in population between the largest and smallest districts and marked differences with respect to each and all of the said districts (R., p. 8, f. 9). Nor were the districts composed of contiguous and compact territory. This lack of contiguity and compactness may be seen by reference to the maps contained in Exhibits "A" and "B" (R., pp. 17-20, ff. 19-20).

This petitioner thereafter, and on the 4th day of May,

1931, commenced this action, after having requested the Attorney General of the State to bring it and the Attorney General had declined so to do. The respondent, the Secretary of State, demurred to the complaint (R., p. 12, f. 14), which demurrer was sustained by the trial court (R., p. 13, f. 15). Thereafter an appeal was taken to the Supreme Court of the State of Minnesota which affirmed the trial court (R., p. 13, f. 15). Thereafter the trial court entered judgment of dismissal on the merits (R., p. 14, f. 16), from which judgment this petitioner appealed to the Supreme Court of the State of Minnesota, which affirmed the judgment below and entered judgment on the 17th day of November, 1931 (R., pp. 15-16, ff. 17-18).

B.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

Importance of Questions Involved.

The matter of dividing a state into congressional districts is of nation-wide importance. Until 1931 such action has been taken in all states by the ordinary and usual lawmaking procedure, namely, by a bill for an act duly passed by both houses of the legislature and submitted to the governor for his approval. But subsequent to the federal Census of 1930 the question of the manner of such districting was raised for the first time in at least four states, namely, Minnesota, New York, Illinois, and Missouri, and in each state recourse has since been had to the courts with contradictory results. It is, therefore, of the utmost importance, since the exercise of the power to redistrict a state for congressional purposes is controlled by federal law, that the question be authoritatively determined by this Court.

Federal Law Erroneously Construed by State Court.

The Supreme Court of the State of Minnesota in the case at bar has erroneously construed the applicable provisions of the federal Constitution; has erroneously determined their effect; and has erroneously determined the question of the existence, and the effect, of certain applicable federal Statutes.

Conflict of Decisions.

The decision of the Supreme Court of the State of Minnesota, in the case at bar, in sustaining the attempted re-districting of the State under House File 1456, is contrary to and in conflict with the decision of this Court in *State ex rel Davis v. Hildebrandt* (1916), 241 U. S. 656, 36 Sup. Ct. 708, 60 Law Ed. 1172, and other applicable decisions of this Court; and is contrary to the applicable decisions of the courts of other states.

Wherefore, Your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the Seal of this Honorable Court, directed to the Supreme Court of the State of Minnesota, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 28825, *The State of Minnesota, upon the Relation of W. Yale Smiley, Petitioner and Appellant, v. Mike Holm, as Secretary of State of the State of Minnesota, St. Paul, Minnesota, Respondent,* and that the judgment of the Supreme Court of the State of Minnesota may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as

to this Honorable Court may seem meet and just, and your petitioner will ever pray.

W. YALE SMILEY,
By GEORGE T. SIMPSON,
Counsel for Petitioner,
730 Security Building,
Minneapolis, Minnesota.

Dated: November 20, 1931.

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1931.
NO.....

W. YALE SMILEY,

Petitioner,

vs.

MIKE HOLM, as Secretary of State of the State of Minnesota, St. Paul, Minnesota, *Respondent.*

BRIEF IN SUPPORT OF WRIT OF CERTIORARI.

[*Acknowledgment is made of the courtesies extended by the Attorney Generals and other counsel interested in the pending redistricting cases from New York, Illinois and Missouri.*]

I.

OPINION OF THE COURT BELOW.

The opinion of the Supreme Court of the State of Minnesota appears in — Minn. —, 238 N. W. 494, 792 (1), and is set forth verbatim as Appendix "D" (R., p. 44, f. 38) and in the Record at page 16, folio 18.

II.

JURISDICTION.

1. The appellate and supervisory jurisdiction of the Supreme Court of the United States is invoked, under Section 237, Judicial Code of the United States (28 U. S. C. A., Sec. 344), to correct error of the Supreme Court of the State of Minnesota in the case cited in the last preceding paragraph. The petitioner brought suit in the courts of the State of Minnesota to challenge the validity

of the attempted division of the State into congressional districts by the 1931 Legislature, under House File 1456, on the ground that said division violates the federal Constitution and laws; and deprives this petitioner of his political rights. The State Supreme Court sustained the validity of House File 1456.

2. Final judgment of the Supreme Court of the State of Minnesota herein was entered on the 17th day of November, 1931 (238 N. W. 792 (1); R., p. 16, f. 18).

3. The case at bar comes within the appellate jurisdiction of this Court, under Section 237 of the Judicial Code, by reason of the admitted allegations set forth in the Petition, which facts are not here repeated to save space and the time of this Court. The provisions of Art. I, Sec. 4, and of the Fourteenth Amendment of the federal Constitution, and the federal Statutes, relating to the apportionment of Representatives among the several States, were drawn in question, as well as the rights, privileges and immunities under the federal Constitution and laws, of the petitioner and other citizens similarly situated. The judgment of the Supreme Court of the State of Minnesota sustained the validity of House File 1456, and adversely determined the claims of this petitioner based on said constitutional and statutory provisions; and denied the asserted rights, privileges and immunities of this petitioner and other citizens similarly situated.

It is clear that this petitioner as a resident, citizen, taxpayer and elector may maintain this action to enforce and protect his political rights and the right to equality in the enjoyment thereof on the authority of the decision of this Court in—

Nixon v. Herndon (1927), 273 U. S. 536, 47 Sup. Ct. 446, 71 L. Ed. 759.

That this Court has jurisdiction in the premises on this petition invoking the Court's appellate and supervisory jurisdiction is established by:—

Cumberland v. Board of Revision (1931), — U. S. —, 52 Sup. Ct. 48, 76 L. Ed. 131.

Santovincenzo v. Egan (1931), — U. S. 66, 52 Sup. Ct. 81, 125 (2), 76 L. Ed. 135.

Van Huffel v. Harkelrode (1931), — U. S. —, 52 Sup. Ct. 115, — L. Ed. —.

People of the State of New York v. Zimmerman (1928), 278 U. S. 63, 49 Sup. Ct. 61, 73 L. Ed. 184.

State ex rel Davis v. Hildebrandt (1916), 241 U. S. 565, 36 Sup. Ct. 708, 60 L. Ed. 1172.

III.

STATEMENT OF CASE.

The facts involved in the case at bar are not in dispute. They were expressly admitted by the respondent in his argument and brief below. Moreover, the facts are admitted, deemed true and uncontradicted as a matter of law, because the respondent has not interposed an answer denying the allegations of the petition, but relied below, and now relies, solely on a demurrer.

Equity Rule No. 29.

Gieger v. First-Troy National Bank (1929), 30 Fed. (2nd) (C. C. A. 6) 7.

Mason's Minnesota Statutes 1927, Section 9251.

Harriet State Bank v. Samels (1925), 164 Minn. 265 (273), 204 N. W. 938.

IV.

SPECIFICATIONS OF ERROR.

1. The Supreme Court of the State of Minnesota erred in sustaining the judgment of the trial court and in entering judgment of dismissal.

2. The Supreme Court of the State of Minnesota erred in construing the word "legislature" in Art. I, Sec. 4 of the federal Constitution and Art. IV, Sec. 23 of the Minnesota Constitution, when that court restricted the meaning to the two bodies of the State Legislature exclusive of the executive action of the Governor.

3. The Supreme Court of the State of Minnesota erred in holding that in April of 1931 and since that time there was and now is no federal regulation of the function of dividing a State into Congressional districts.

4. The Supreme Court of the State of Minnesota erred in holding that the rights, privileges and immunities guaranteed to this petitioner, and others similarly situated under the equal protection clause of the Fourteenth Amendment, are not violated by House File 1456.

5. The Supreme Court of the State of Minnesota erred in holding that the courts cannot grant relief in the premises.

V.

ARGUMENT.

Summary of Argument.

The petitioner claims that the attempted division of the State of Minnesota into nine congressional districts by the Minnesota Legislature at the 1931 session thereof, by means of House File 1456, is invalid for any purpose. That his petition in the state courts properly and sufficiently challenged the validity of House File 1456, and

that the final judgment of the State Supreme Court, and its action, in sustaining the judgment of dismissal by the trial court, are erroneous for the following reasons:

A. House File 1456 is not the action of the "Legislature" within the meaning of Art. I, Sec. 4 of the United States Constitution.

B. House File 1456 is invalid because it does not comply with and because it violates existing federal constitutional and statutory provisions, regulating the function and act of, dividing a state into congressional districts.

C. House File 1456 is invalid because it is an unequal and arbitrary division of the state; is subversive of fundamental principles of equality and fairness in the enjoyment of political rights of citizens throughout the state; discriminates between citizens of the various districts; and abridges the rights, privileges and immunities of this petitioner under the equal protection clause of the Fourteenth Amendment.

D. The courts have the power, and in the premises the court below was under the duty, to grant relief.

The Ultimate Questions Presented.

The issues may be summarized in two questions for the determination of this Court:

1. Are the State Legislatures, when dividing the state into congressional districts, required to follow the procedure necessary in making laws?

2. Must the division be reasonably equal as to population, and contiguous and compact as to territory? In other words, is political gerrymandering prohibited?

The petitioner invites the attention of this Court to the fact, which cannot be emphasized too much, that no challenge is here made by the petitioner as to the *form* of government, either by reason of the action of the

State or by action of Congress. Whether House File 1456 is, or tends to be, destructive of republican *form* of government is not raised. We challenge only the unlawful *exercise* of the legislature's powers. We challenge only House File 1456 because it is unauthorized by law, unfair and unequal in result, and because it discriminates between qualified electors in the different districts.

Pacific States Tel. & Tel. Co. v. Oregon (1912), 223 U. S. 118, 32 Sup. Ct. 224, 56 L. Ed. 377.

Point A.

(Assignment of Errors 1 and 2.)

House File 1456 is not the action of the "Legislature" within the meaning of Article I, Sec. 4, U. S. Constitution.

A short analysis of the function and the act of dividing a state into congressional districts may help to clarify the issues before this Court.

With respect to the method, some of the states have provided for making such division by provision in the state Constitution; some have proceeded by statute only; others have done neither; and some have done both. In Minnesota, both constitutional provisions (Appendix L, p. 57) and Statutes (Appendix Q, p. 63) have been provided.

With respect to the agency, that is, the department of the state government by which the division is to be made, it has uniformly, and without exception, been done by the legislative branch rather than by the executive or judicial departments (Appendix R., p. 63). Indeed it is conceded, below, that the function and act of dividing a state is essentially legislative in character.

As between the federal and state governments, it is submitted that such division is made primarily for the benefit of the state, and its people, rather than in the interest of the federal government. For, where a state is entitled to nine representatives in Congress, it is relatively unimportant to the federal government whether the congressmen are elected at large or from districts. The state legislature, insofar as it is part of the legislative power of the state, may, and does, act in two capacities: First, in the ordinary, usual, *legislative* capacity, that is, the enacting of a bill for an act which will result in a law, when and if approved, by the governor of the state, or, if rejected by him, re-passed over his veto by the majority required under state law; second in the *representative* capacity in which the legislature acts, when it is ratifying an amendment to the federal Constitution; or when, prior to the Seventeenth Amendment to the federal Constitution, it was selecting senators to represent the state in the upper branch of Congress. This distinction has been laid down in the cases of:

State ex rel Davis v. Hildebrandt, supra.

State ex rel Hawke v. Smith (1920), 253 U. S. 221, 4 Sup. Ct. 495, 64 L. Ed. 871.

On the question of the source of the power of a state to divide the state into congressional districts, there is a division of authority. One side proceeds on the theory that the power is an inherent and reserved power (Story on Const., Vol. I, Sec. 815); the other, that the power is derived from the federal government to which it had been surrendered. Inasmuch as the court below, although apparently on the latter side, states that the question need not be determined, because in any event the power is now lodged in the state, subject only to the provisions of the United States Constitution and to regulation by

Congress—with which latter statement we fully agree—we pass the matter without further comment, except to invite the attention of this Court to the discussion of this point in the dissenting opinion below (R., p. 59, f. 55).

On the foregoing basis, it is submitted that the dividing of a state, into congressional districts, is a function and act performed, primarily, for the benefit of the state and its people; that the function and act call for the exercise of the legislative power of the state; and that the power to make such division is lodged in the state, subject, however, to the provisions of the federal Constitution and regulation by Congress. The question of whether, or not, Congress has exercised its powers of regulation, and whether such regulation was in existence at the time of the attempted passage of House File 1456, will be discussed below under Point B.

With this in mind, we may now inquire as to the meaning of the words "prescribed in each state by the legislature thereof" in Art. I, Sec. 4, of the Constitution of the United States. The petitioner insists that the words "prescribed in each State by the legislature thereof" means the law-making power of the states and includes, in Minnesota, the approval or veto of the governor.

The legislature, as one of three coordinate branches of our system of government, is primarily a law-making body. It can, and ordinarily does, express itself only through its action in making laws, although under our dual system of government, the state legislatures, for certain purposes, have a representative character. The legislature, in dividing a state into congressional districts, is called upon to exercise, and can exercise only, its ordinary and usual legislative, or law-making powers, and in no sense can be said to be acting in its representa-

tive capacity. We submit that this construction was determined by this Court in the case of *State ex rel Davis v. Hildebrandt, supra,* and that this case is decisive of that question. See also *State ex rel Hawke v. Smith, supra.* Therefore, it was idle for the respondent, and for the court below, to accumulate references to the meaning of the word "legislature" as used in the various sections of the federal Constitution, for the purpose of showing that the legislature can act only in a legislative capacity, and it is idle to argue that because of the evident meaning of "legislature" in such other constitutional provisions, inapplicable here, however, the term "legislature" as used in Art. I, Sec. 4, is to be limited to the two houses of the state legislature and excludes action by the governor. We submit that the majority of our state Supreme Court failed to appreciate the significance of the distinction between the legislative and representative functions of the legislature; and hence reached an erroneous conclusion as to the meaning of the word "legislature." This was the precise point upon which the two dissenting justices disagreed with the majority. Finally, the judicial construction by state courts, with the exception of the Supreme Court of the State of Minnesota, in the case at bar, is also in accord in holding that the term "legislature" in Art. I, Sec. 4, means the legislative, or law-making power of the state; and includes the veto power of the governor, or the veto power of the people, the referendum, if so provided by state law.

Thus it appears that the legislature's power is only part of the power to enact laws; and that enacting laws is not the exclusive attribute of the state legislature (Appendix M, p. 58). Its enactments or resolutions have no force as laws generally, and in Minnesota in particular,

unless and until submitted to and approved by the governor; or, if vetoed by him, repassed over his veto by the majority necessary under the state constitution. As one eminent jurist has said:

"In the State of New York that [law-making] department is not the Legislature alone, but the Legislature and the Governor, the one as much as the other an essential factor in the process. *People v. Bowen*, 21 N. Y. 517, 519, 521; *Matter of City of Long Beach v. Public Service Commission*, 249 N. Y. 480, 489, 490; 164 N. E. 553. We beg the question when we argue that the Legislature may give immunity because the Legislature is the sole custodian of the legislative power. It is not the sole custodian of that power. The power is divided between the Legislature and the Governor. *Cf. Ohio ex rel Davis v. Hildebrandt*, 241 U. S. 565, 36 Sup. Ct. 708, 60 L. Ed. 1172; *Hawke v. Smith*, 253 U. S. 221, 40 Sup. Ct. 495, 64 L. Ed. 871, 10 A. L. R. 1504. * * * The Legislature can initiate, but without the action of the Governor is powerless to complete. Not only do we beg to question when we infer the validity of the immunity from the possession by the Legislature of the full legislative power; we concede by implication that, unless the legislative power has been thus committed without division, the immunity must fail. The argument, reduced to that basis, is seen to be self-destructive. The grant of an immunity is in very truth the assumption of a legislative power, and that is why the Legislature, acting alone, is incompetent to declare it. It is the assumption of a power to annul as to individuals or classes the statutory law of crimes, to stem the course of justice, to absolve the grand jurors of the county from the performance

of their duties, and the prosecuting officer from his. All these changes may be wrought through the enactment of a Statute. They may be wrought in no other way while the legislative structure of our government continues what it is."

Doyle v. Hoffstadter (1931), 257 N. Y. 244, 177 N. E. 489, 495.

Stuart v. Chapman (1908), 104 Me. 17, 70 Atl. 1069.

Spokane Grain & Fuel Co. v. Lyttakee (1910), 59 Wash. 76, 109 Pac. 316.

Gottstein v. Lister (1915), 88 Colo. 462, 153 Pac. 595.

It is significant, also, that Congress itself can provide for apportionment of representatives among the several states, only by law (Appendix E, p. 39), which must be submitted to and approved by the President, or repassed over his veto (Art. I, Sec. 7, U. S. Const.). Congress has never attempted to dictate to the states as to how their legislatures were to be made up. Nor can any intention, or act of Congress, be found in which it has attempted to deny, or defeat, the function of the governor as part of the legislative power of the state, if such function is provided by state law.

The framers of the federal Constitution intended, and expected, the legislative power of the state to be used in dividing the state into congressional districts. This seems clear but we will not enlarge on the reasons set out in the dissenting opinion (R., p. 58, f. 54).

Congress has consistently recognized and acted on the same construction and this is shown by the history of statutory apportionment (Appendix G, p. 41) particularly by reference to the Act of 1911 (Appendix H, p. 42), the

Act of 1926 (Appendix I, p. 44), and the Act of 1929 (Appendix J, p. 46). The debates, when the subject was being considered by Congress (Appendix K, p. 48) show, conclusively, that Congress intended and expected the division to be made by the state legislatures, in the same manner and by the same procedure, necessary under state law in enacting laws.

Consonant with the foregoing, all the state legislatures, for more than 140 years, have so construed their own powers in such matters the conclusion of the court below to the contrary notwithstanding. This is conclusively shown by the various applicable state constitutional provisions and statutes, and by reference to the history of redistricting in all the states (Appendix R, p. 63).

In Minnesota, until the present legislature of 1931, the above construction has been given to the words "prescribed in each state by the legislature thereof" (Art. I, Sec. 4, U. S. Const.). The framers of the State Constitution used the term "legislature" in Art. 4, Sec. 23, of the Minnesota Constitution in the same sense and in the light of the long-established practical construction of the same word in Art. I, Sec. 4, of the federal Constitution (Appendices M, N, and O, pp. 58-61). The districting last prior to the attempted enactment of House File 1456, was made in 1913 and in the usual course was made by law; that is, by a bill for an act duly approved by the governor (Laws Minn. 1913, Chap. 513) and this law was amended by the 1929 legislature, also as usual by law. (Laws Minn. 1929, Chap. 64.)

The 1931 legislature followed the usual and established method; for, it intentionally framed House File 1456 as a bill for an act; it intentionally, and in the usual course, submitted this bill for an act to the Governor for his approval; and it was only *after* the Governor vetoed the

bill, as unfair and unequal, that any intent arose to proceed by any other method. Even then it was the intent of the lower house, only, and not concurred in or acted upon by the Senate. It is therefore submitted that the belated intention of the House, alone, to convert the vetoed, unamended bill for an act into a concurrent resolution could have no such legal effect. But even if it had been submitted, and concurred in, by the senate, and the intent to proceed by resolution, rather than by bill for an act, could be said to be retroactive, the resolution would be invalid under the Constitution of Minnesota, if not submitted to, and approved by, the governor, or passed over his veto (Art. 4, Sec. 12, Minn. Const., Appendix M, p. 53). In any event, a concurrent resolution is not a law, and does not have the legal significance of a law; and could not repeal, amend or affect the existing law, or substitute for it something less than a law.

Sjoberg v. Security Savings & Loan Ass'n (1898), 73 Minn. 203 (212, 214), 75 N. W. 1116.

Doyle v. Hoffstadter (1931), 257 N. Y. 244, 177 N. E. 489.

Fitzgerald v. Voorhis (1918), 222 N. Y. 494, 119 N. E. 106.

People ex rel Argus Co. v. Palmer (1895), 12 Misc. 392, 33 N. Y. S. 1088; aff'd in 146 N. Y. 406 (2), 42 N. E. 543 (13).

City of Carlyle v. Nicolay (1929), 333 Ill. 562, 165 N. E. 211.

State v. Zimmerman (1925), 187 Wisc. 180, 204 N. W. 803 (812).

It may be argued that practical construction cannot be used and is of no value in the premises. The majority opinion below so holds. But the short and convincing answer is found in the dissenting opinion (R., p. 62, f.

58), namely, that the word "legislature" as used in Art. I, Sec. 4 (U. S. Const.) has been differently construed by courts of last resort. The meaning therefore is in doubt; and a resort to practical construction is proper. Indeed, the majority opinion resorts to practical construction to justify its conclusion that the Act of 1911 was limited to the apportionment then made and is no longer in force; yet when the petitioner attempted to fortify his argument, by reference to the history of the apportionment Acts of Congress, and the districting acts of the states, and particularly that of the State of Minnesota, the majority inconsistently said (R., p. 56, f. 51):

> "We are of the opinion that since the matter here involved arises out of the federal constitution and its meaning is so clear and the purpose is so apparent, the language being used in its ordinary meaning that there is no room for the application of the doctrine of practical construction."

However, aside from this inconsistency, it is confidently submitted that the practical construction here relied on by the petitioner is not only proper but of persuasive importance. Chief Justice White of this Court in *State ex rel Davis v. Hildebrandt, supra*, quoted applicable portions of the Congressional Record. See also:

Stuart v. Laird (1803), 5 U. S. (1) Cranch 298, 299, 2 L. Ed. 115.

Ex Parte Grossman (1924), 267 U. S. 87 (119), 45 Sup. Ct. 232, 69 L. Ed. 527.

McGrain v. Daugherty (1927), 273 U. S. 135 (174), 47 Sup. Ct. 319, 71 L. Ed. 580.

State v. Sullivan (1912), 117 Minn. 329, 135 N. W. 748.

Dunnell's Minnesota Digest (1910), Section 8952.

People v. Murray (1896), 149 N. Y. 367, 42 N. E. 584.

Matter of La Rocca v. Flynn (1931), 257 N. Y. 5 (13), 177 N. E. 290.

Story v. Craig (1921), 231 N. Y. 33 (40), 131 N. E. 560.

The uniform, and consistent, practical construction, by the framers of the federal Constitution and the state constitutions, by the Congress, and by the states for over 140 years, cannot be lightly ignored. In the face of this authority, the very recent acts of the legislatures of Minnesota and of New York only serve to emphasize the significance of the established practice.

Koenig v. Flynn (1931), Sup. Ct. N. Y. (Appendix T, p. 74).

As stated above, until 1931 no question had been raised, as to whether or not, the legislature, when dividing a state into congressional districts, was required to proceed by the usual method in enacting laws. Heretofore cases have arisen only over the question as whether or not the referendum was included in the procedure. In *State ex rel Davis v. Hildebrandt, supra,* it was assumed, in the briefs of counsel, that the governor was a part of the legislative power. The decision in that case construes the word "legislature" in Art. I, Sec. 4 (U. S. Const.) as meaning "legislative power," "legislative authority," "state legislative power." In the later case of *State ex rel Hawke v. Smith, supra,* this Court used the same, and similar terms, to distinguish between the function, and the act, of the state legislature when ratifying an amendment to the federal Constitution, and when dividing a state into congressional districts. We feel that no further authority is necessary. However, solely for the information of the Court, we cite the decisions of the Supreme Court of

the State of South Dakota, and of the Supreme Court of the State of New York, and of the Circuit Court of the State of Illinois:

State ex rel Schrader v. Polley (1910), 26 S. D. 5, 127 N. W. 848.

Koenig v. Flynn (1931), Supreme Court, New York (Appendix T, p. 74).

Moran v. Bowley (1931), Circuit Court, Ill. (Appendix S, p. 66).

It is needless to point out that these decisions consistently follow, and reach the same conclusions, as do the two decisions of this Court just cited.

While the respondent argues that, linguistically, the word "legislature" in Art. I, Sec. 4 (U. S. Const.) may and should be construed so as to limit its meaning to the two houses of the legislature, there can be no doubt, under the decisions of this Court, and under the long-established practice, that the true meaning includes the governor, and embraces the entire legislative power of the state. The latter construction is urged here as the proper one to produce the best consequences throughout the nation. To sustain the judgment below limiting the meaning of "legislature" in Art. I, Sec. 4 (U. S. Const.) to the two houses of the state legislature would reverse the Hildebrandt case and nullify the intention of Congress; or, as Mr. Justice Stone well says, if the term "legislature" as used in Art. I, Sec. 4, "does not refer to the legislative power of the state, however exercised, but is confined to the members of the legislatures, as such, and so excludes legislative veto, it equally excludes veto by referendum, and both the opinion of Congress and the decision in the Hildebrandt case are wrong" (R., p. 61, f. 57). It may be added, that it would also reverse the decisions of the state courts

above cited and upset and annul the long-established, uniform procedure throughout the entire nation.

Point B.

(Assignments of Error 1 and 3.)

House File 1456 is Invalid Because It Does Not Comply with Existing Federal Constitutional Provisions and Statutory Regulations.

The majority below holds, that because, in its opinion, the Act of August 8, 1911, is "no longer in the picture," therefore the power of the 1931 Minnesota legislature, to redistrict the state, "is unrestricted, unlimited and absolute" (R., p. 57, f. 52); that Congress in the Act of June 18, 1929, had "reverted to the character of the legislature, in vogue, prior to 1911, when no control over legislative method was attempted" (R., p. 55, f. 50); and that the only restraint, recognized by the court, are that the "members are amenable to their constituents" and that the exercise of the power "must depend largely upon the integrity of the legislature" (R., p. 56, f. 51).

With these statements and conclusions we respectfully disagree. We submit that Sections 3 and 4 of the Act of 1911 are still in force, and require districts to be equal in number of inhabitants and contiguous and compact as to territory. We disagree with the suggestion, that prior to 1911, there was no subsisting restraint, on the state legislatures, when dividing a state into congressional districts; that since June 18, 1929, the legislatures are unrestricted, unlimited and absolute; and that they are under no restraint whatever by federal law. We cannot agree with the conclusion that the constituents of the members, and the "integrity of the legislature," are the only restraint on that body. With respects to the latter,

it perhaps may be remarked, that the same legislature which attempted to enact House File 1456 also enacted Chapter 105 of the Laws of Minnesota, 1931. This law, in words practically paraphrasing Section 3 of the Act of 1911, requires commissioner districts within the various counties of the state to be laid out so as to contain an equal number of inhabitants and to be contiguous in territory (Appendix P, p. 62).

We have presented, above, the argument that Art. I, Sec. 4 of the United States Constitution, insofar as it requires the districting to be done by the "legislature," is itself a restraint. Another restraint exists in the Fourteenth Amendment which prohibits the denial of the equal protection of the law. This restraint will be discussed under Point C. In addition we claim that the courts are always available to keep the state legislatures within the bounds of a reasonable and lawful exercise of their powers. This restraint will be discussed under Point D.

The opinion below was based upon the assumption that the Act of 1911 is no longer in force, and ignores the facts that since 1842 districts must be made up of contiguous territory; that since 1872, just after the adoption of the Fourteenth Amendment, districts must contain an equal number of inhabitants; and that since 1901 districts must also be compact in territory (Appendix G, p. 41). But we insist that the Act of 1911 is still in force and effect for other reasons.

(1) Because of the language of the act itself (Appendix H, p. 42).

The Act of 1911 deals with two distinct subjects: (a) with the aggregate number of representatives apportioned among the several states (Sections 1 and 2); and (b) with the manner and the method of laying out con-

gressional districts (Sections 3, 4 and 5). Notwithstanding this, the claim of respondent and the opinion of the court below, is to the effect that the title to the act indicates the intention of Congress, and that thereby the entire act, for all purposes, accordingly, is limited, as to its duration. But the title to the Act is no part of the Act, particularly under the Federal system (*Haddon v. Barney* (1867), 73 U. S. 107, 18 L. Ed. 518). Hence it follows that while, for some purposes, the title, perhaps, might be looked to in an effort to discover an intention on the part of Congress to limit the duration of Sections 1 and 2, yet nothing therein indicates such intention as regards Sections 3 and 4; because these sections deal expressly and specifically with the manner and method of dividing a state into congressional districts—a subject entirely separate and distinct. They require an equality, in number of inhabitants, and contiguity and compactness, in territory and expressly provide that "representatives to the Sixty-third, and each subsequent Congress," shall be elected from such districts. Section 5 refers only to the nomination and election of candidates at large. The title is silent as to all of these matters.

In this connection it is to be pointed out that the phrase "in each State entitled under this apportionment to more than one Representative" modifies the word "State" as used in Section 3 by designating the States that shall elect Representatives from districts composed of contiguous and compact territory, and containing as nearly as practicable an equal number of inhabitants. This construction is apparent if we omit that part of the above quoted phrase reading, "entitled under this apportionment to more than one Representative." And we submit this language clearly does not limit the provisions of Section 3 to the period covered by the 1910 census.

(2) Because Congress intended Sections 3 and 4 of the Act of 1911 to be permanent.

Following the Census of 1920 no new apportionment act was passed by Congress; but Congress permitted, and intended, that Sections 3 and 4 should continue to control. This alone refutes the argument of the respondent, and the opinion of the court below, that the Act of 1911 was limited, by its own terms, to the apportionment then made. Further, in 1925 and 1926 Congress incorporated Sections 3 and 4 into the code of permanent laws. (Appendix I, p. 44). It will be observed that this was fifteen years after the Act of 1911 was passed and six years after the 1920 Census. It is also of real significance, that, in so incorporating these provisions, appropriate changes were made in the title and text.

We take it that respondent must and does concede, as the court below did, that if Section 3 of the Act of 1911 is still in force the petitioner must prevail. But the respondent argues, and the court below held, that the Act of 1911 is no longer in force, because, it was limited, by its own terms, to the apportionment then made. We believe that we have disposed of this argument. But it remains to be pointed out that if the Act of 1911 expired by its own limitations, the argument of respondent, upheld by the court below, that it was repealed by the Act of 1929 is, to say the least, inconsistent and that one or the other of these views must be wrong.

(3) Because Sections 3 and 4 of the Act of 1911 have never been expressly repealed.

The only repeal section found in any later apportionment act is found in Section 21 of the Act of 1929; but this section is not an express repeal of Sections 3 or/and 4 of the Act of 1911.

(4) Because Sections 3 and/or 4 of the Act of 1911 have never been impliedly repealed.

The Act of 1929, as the court below agrees, is primarily a census act (Appendix J, p. 46). In the first instance it was designed, as the report of the Committee on Commerce of the Senate shows, to deal, only, with the subject of the census of 1930. The first 20 sections are addressed exclusively to that subject. The next section, the 21st, provides that "all other laws and parts of laws inconsistent with the provisions of this Act are hereby repealed." These 21 sections constituted the entire act as originally intended and drafted. Section 22, dealing with a second and different subject, the apportionment of the total number of Congressmen among the several states, was an afterthought and was added to the otherwise complete bill dealing with the census. The third and distinct subject of congressional districts, the manner and method of laying them out, prescribed in sections 3 and 4 of the Act of 1911 does not appear, and was not intended, to be dealt with, in the Act of 1929. For the first time in the history of congressional apportionment, a single act deals with both census and apportionment. Up to 1929 the former was always provided by a separate act passed *in advance* of the census to be taken. The apportionment invariably was made by a separate act passed *after* the census was taken. The Act of 1929 is therefore unique in providing for apportionment in advance of the census upon which the apportionment was to be based. So much of the Act of 1929, viz.: Sec. 22, as deals with apportionment, follows rather than precedes, the repealing clause in Section 21. This is significant. It is significant because of the facts just mentioned—the contents of the first twenty sections, the position of the repealing clause, and the novelty of join-

ing thereto an apportionment act in advance of the census to be taken. The conclusion is irresistible that section 21 as a repealing clause is addressed, solely and strictly, to prior legislation dealing with the single subject of census. We submit it does not even extend to the second subject, the apportionment of representatives among the several states, although we will not argue the point. But we most earnestly contend that the repealing clause clearly is not addressed to the third, distinct subject—the manner and method of laying out districts—and therefore there can be no implied repeal of sections 3 and 4 of the Act of 1911.

It is an elementary principle of statutory construction that repeals by implication are not favored.

Graham v. Goodcell (1931), 282 U. S. 409 (425), 51 Sup. Ct. 186, 75 L. Ed. 415.

Cooley's Const. Lim., 5 Ed., p. 183.

25 *R. C. L.*, p. 918, Sec. 169.

and that in any event consistent portions of prior laws are not repealed.

Henderson's Tobacco (1870), 78 U. S. 652, 20 L. Ed. 235.

Kennedy v. U. S. (1924), 265 U. S. 344, 44 Sup. Ct. 501, 68 L. Ed. 1045, 25 R. C. L., pp. 920, 922, Sec. 170-171.

The court below held, however, that "some portions of the 1929 law were inconsistent with the same sections in the 1911 law" (R., p. 49, f. 43). This we respectfully submit is an inaccurate and misleading conclusion. The court did not point out the inconsistent portions and none can be designated; because, barring the first twenty sections of the Act of 1929, which are not applicable, there is no inconsistency. The latter act, and section 3 of the Act of 1911, are not duplications, or mutually contradic-

gressional districts (Sections 3, 4 and 5). Notwithstanding this, the claim of respondent and the opinion of the court below, is to the effect that the title to the act indicates the intention of Congress, and that thereby the entire act, for all purposes, accordingly, is limited, as to its duration. But the title to the Act is no part of the Act, particularly under the Federal system (*Haddon v. Barney* (1867), 73 U. S. 107, 18 L. Ed. 518). Hence it follows that while, for some purposes, the title, perhaps, might be looked to in an effort to discover an intention on the part of Congress to limit the duration of Sections 1 and 2, yet nothing therein indicates such intention as regards Sections 3 and 4; because these sections deal expressly and specifically with the manner and method of dividing a state into congressional districts—a subject entirely separate and distinct. They require an equality, in number of inhabitants, and contiguity and compactness, in territory and expressly provide that "representatives to the Sixty-third, and each subsequent Congress," shall be elected from such districts. Section 5 refers only to the nomination and election of candidates at large. The title is silent as to all of these matters.

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We take it that respondent must and does concede, as the court below did, that if Section 3 of the Act of 1911 is still in force the petitioner must prevail. But the respondent argues, and the court below held, that the Act of 1911 is no longer in force, because, it was limited, by its own terms, to the apportionment then made. We believe that we have disposed of this argument. But it remains to be pointed out that if the Act of 1911 expired by its own limitations, the argument of respondent, upheld by the court below, that it was repealed by the Act of 1929 is, to say the least, inconsistent and that one or the other of these views must be wrong.

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ing thereto an apportionment act in advance of the census to be taken. The conclusion is irresistible that section 21 as a repealing clause is addressed, solely and strictly, to prior legislation dealing with the single subject of census. We submit it does not even extend to the second subject, the apportionment of representatives among the several states, although we will not argue the point. But we most earnestly contend that the repealing clause clearly is not addressed to the third, distinct subject—the manner and method of laying out districts—and therefore there can be no implied repeal of sections 3 and 4 of the Act of 1911.

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The court below held, however, that "some portions of the 1929 law were inconsistent with the same sections in the 1911 law" (R., p. 49, f. 43). This we respectfully submit is an inaccurate and misleading conclusion. The court did not point out the inconsistent portions and none can be designated; because, barring the first twenty sections of the Act of 1929, which are not applicable, there is no inconsistency. The latter act, and section 3 of the Act of 1911, are not duplications, or mutually contradic-

tory; but are complementary and mutually consistent. This all clearly appears from the debates, when the question of possible conflict was before the Congress (Appendix K, p. 48). We confidently submit that reference to this material will show conclusively, that it was, and is, the intention of Congress, made effective by its action, to continue section 3, of the Act of 1911, in force and effect. We will not take the space to set out the precise language, but earnestly urge the Court to refer to the Congressional Record, the excerpt from which appears in Appendix K (p. 48), for an accurate statement of what took place when this bill was under consideration.

If this be true, it hardly need be said, then, that on the admission of the court below, House File 1456 is invalid, because it violates the provisions of section 3 of the Act of 1911.

Point C.

(Assignments of Error 1 and 4.)

House File 1456 Is Invalid Because It Is Unequal and Discriminatory.

The Fourteenth Amendment to the federal Constitution was, and is, likewise a subsisting restriction, on the legislatures of the several states, in the exercise of the power to divide the states into congressional districts. Insofar as the Minnesota legislature, for 1931, has acted, for the purposes discussed under Point A, *supra*, the legislature is prohibited from exercising its powers in an arbitrary and unreasonable manner. It cannot act, so as to deny, and abridge the rights of the petitioner under the equal protection clause. It cannot deny, and abridge, the rights of the citizens, and qualified voters, in the various districts, by unjust and unreasonable discriminations, between them. The court below, summarily, dismissed

all consideration of the Amendment by holding that it was inapplicable in the premises and that it was not violated by House File 1456. The court said: "Suffrage is not one" of the "privileges and immunities" of citizens. With these conclusions we respectfully disagree. We submit that the statement relative to suffrage is beside the point, as well as misleading; because the principle involved, in the case at bar, is not the power of the state to require reasonable and uniform qualifications, or other lawful requirements, as conditions precedent, to the privilege of voting. We are not concerned with the situation, where because of the refusal or inability to satisfy such requirements, the state withholds from a would-be voter the privilege of suffrage. What we challenge is the discrimination, and the lack of the equality, between qualified voters—the violation of the rights of the petitioner, as a citizen and qualified voter—and the violation of the rights of all other citizens and qualified voters in the various districts.

That the violation in any form of such rights derived from the federal government is prohibited to the states and, when properly challenged, that the courts will protect such rights, is clear.

Nixon v. Herndon (1927), 273 U. S. 536, 47 Sup. Ct. 446, 71 L. Ed. 759.

Swafford v. Templeton (1902), 185 U. S. 487, 22 Sup. Ct. 783, 46 L. Ed. 1005.

See also:

Civil Rights Cases (1883), 109 U. S. 3, 3 Sup. Ct. 18, 27 L. Ed. 836.

Standard Scales Co. v. Farrell (1919), 249 U. S. 571 (577), 39 Sup. Ct. 380, 63 L. Ed. 780.

Maxwell v. Bugbee (1919), 250 U. S. 525 (537, 538), 40 Sup. Ct. 2, 63 L. Ed. 1124.

Power Co. v. Saunders (1927), 274 U. S. 490 (493, 497), 47 Sup. Ct. 678, 71 L. Ed. 1165.

The inequality and lack of compactness under House File 1456 are substantial and not trivial. In the following decisions the same vices were apparent in the division of states for local purposes, and relief was granted by the courts.

People ex rel Baird v. Supervisors (1893), 138 N. Y. 95, 33 N. E. 827.

Sherrill v. O'Brien (1907), 188 N. Y. 185, 81 N. E. 124.

In Re Dowling (1916), 219 N. Y. 44, 113 N. E. 545.

See also cases cited on page 36 hereof.

Let us analyze briefly the division made under House File 1456. On the basis of a population of 2,551,583, each of nine congressional districts should contain 283,509 inhabitants. Under House File 1456 four districts—1, 2, 8 and 9—have less than that number. One district only, the 4th, has approximately that number. Four districts—3, 5, 6 and 7—have more. The smallest district, the 1st, contains 115,904 less than the largest district, the 5th. The difference in percentage exceeds fifty per cent! In other words, two voters in the 1st district enjoy political rights equal to, and thereby receive a privilege over, three voters in the 5th district; or putting the matter another way, three voters in the 5th district enjoy political rights equal only to two voters in the 1st district. The same is approximately true as between citizens and voters of the 1st and the 7th districts. Marked differences are present also between other districts. If the number of inhabitants in the 1st district, under House File 1456, is taken as the basis for all nine districts, only 2,057,354 inhabitants of the State are

represented in Congress. Almost a half million inhabitants are not represented at all!

The political rights of self-government and equal representation in the federal law-making body, its composition and action are thus denied to all citizens of the State of Minnesota by House File 1456. Its vices are all the more shocking because the discrimination is in favor of the rural districts at the expense of the urban districts. It is common knowledge that the latter increase in population more rapidly than do the rural districts. Hence, if House File 1456 is permitted to stand, the present discrimination will persist and will constantly increase during the next ten years. The Governor's message, accompanying his veto of House File 1456, characterizes the difference in population "as obviously an inequitable distribution of the population of Minnesota" and further emphasizes the "unfair discrimination between agricultural districts" in a state which is essentially "an agricultural state" (R., p. 6, f. 7).

The lack of compactness is shown by the maps of the State and of Minneapolis (R., pp. 17-19, ff. 19, 20). The 3rd district, in no sense, can be said to be compact; for starting in Washington County on the eastern border of the state it winds its circuitous way southward into Goodhue County, north into Carver County, northeast into Hennepin County, and into part of the City of Minneapolis therein; thus almost entirely surrounding Ramsey County and the 4th congressional district. The 7th district among others, is an obviously flagrant violation of the principles of compactness, for this district starts at the western edge of the state, and sweeps clear across the state, to include two wards of the City of Minneapolis, almost on the eastern border. The territory embraced in this district, moreover, has different and perhaps even hostile

interests, the greater area being essentially agricultural; the other being a portion of the highly concentrated urban population of the largest city of the state, and its chief industrial center.

The respondent takes the position that he is not obliged to justify the division made by House File 1456. He argues that it is sufficient that the legislature has acted. In this view the majority of the court below agree. But if they are correct in this, it is idle and inconsistent for the respondent to argue that the matter of dividing a state into congressional districts is a delicate and difficult matter; and that the legislature in House File 1456 made the best possible division. It is idle for the same reasons for respondent to seek to minimize the inequality and the lack of compactness. Moreover by the demurrer all the allegations of the petition are admitted.

Point D.

(Assignments of Error 1 and 5.)

The Courts Have Power to Grant Relief and the Court Below Was Under the Duty to Grant Relief in the Premises.

The respondent argues that the courts have no power to grant relief in the premises. This opinion seems to be shared by the court below, but it is submitted that there can be no question as to the existence of the power of the courts to grant such relief. The only question which can arise is, whether a given case presents the occasion, when it is proper and necessary to exercise the power. The court below concedes this when it states "though a case might arise that would require our disapproval, this does not seem to be such" (R., p. 56, f. 51).

The respondent attempted, below, and apparently succeeded, in warping an established principle of American law in his favor. That is, he sought, by attempting to minimize the vices of House File 1456, to demonstrate that this was not a proper case in which to grant relief. The respondent went further and sought to convince the court below that it could not grant relief, by urging the dire results to follow should House File 1456 be declared invalid. He stressed the undesirable result of having no districting act on the books, the undesirability of having Minnesota's representatives elected at large, and the expense involved in calling a special session of the legislature to make another division. All of this, we submit, is immaterial in this proceeding, and also that it is no fault of the petitioner and the other citizens and voters of the state. Let the responsibility rest with the 1931 legislature and those who advised it. This argument, in any event, should not be considered by the courts especially where it opposes the fundamental rights of citizens and voters throughout the entire state. These important rights should not be sacrificed to save a few dollars; or to save the members of the legislature a little inconvenience; particularly in this case, because here the legislature might have avoided such results, and it alone made any inconvenience necessary.

Nor is the petitioner under any duty to suggest a better, or more equitable, division of the state. That is solely for the legislature in the first instance. The petitioner alleged in the petition below that the division under House File 1456 was not fair, was not equal, was not contiguous and compact, and was not the best possible division. The Governor's message likewise assigns these defects as reasons in vetoing the bill (R., pp. 5-6,

ff. 6, 7). The respondent by his demurrer admits this. No more need be said.

One more argument made below is likewise fallacious. The respondent argued that to permit the governor to annul a division made by the legislature, regardless of its fairness or result, is to deny a fundamental American principle, that the majority should rule. But the argument is so unsound as to hardly merit an answer. It completely ignores not only the provisions of the State Constitution which conferred the veto power upon the executive; but also ignores the fundamental principle, underlying the system of checks and balances, between the three great departments in our system of government. In this case, it is suggested that the principle is vindicated; because the veto power was asserted by a vigilant and patriotic governor to check an admittedly unfair and unequal act of the legislature. The petitioner contends that House File 1456 was designed for questionable political purposes, only, and deliberately violated the basic principles of equality in the enjoyment of political rights by the petitioner and by all the people of the state.

While the state judiciary may be reluctant to grant relief, in cases where the action of the legislature is questioned, especially where, as in the case at bar, the court appreciates that the legislature is performing an act subject to federal regulation; and while ordinarily the propriety or necessity for action by the courts may be raised in a given case, it is earnestly contended that the case at bar is not such a case. The failure of the court below to grant relief was not merely due to reluctance, but to excessive caution. The court, it is respectfully submitted, was in error in not granting the relief sought, because the facts alleged by the petitioner were admitted by the demurrer. Under these admitted facts the court, as the

guardian of the constitutional rights asserted, was under the duty to grant the relief sought and to uphold the Constitution.

That the state courts generally have not hesitated to grant relief in similar cases where the legislature's division of the state into districts and subdivisions for state purposes was challenged for the same reasons, is apparent from the following representative cases:

Stiglitz v. Schardien (1931), — Ky. —, 40 S. W. (2) 315.

People v. Tremain (1929), 252 N. Y. 27, 168 N. E. 817.

Doyle v. Hoffstadter (1931), 257 N. Y. 244, 177 N. E. 489.

State v. Cunningham (1892), 81 Wisc. 440, 51 N. W. 724.

State v. Cunningham (1892), 83 Wisc. 90, 53 N. W. 35.

Giddings v. Blacker (1892), 93 Mich. 1, 52 N. W. 944.

Putnam v. Pyle (1930), — S. D. —, 232 N. W. 20.

Brooks v. State (1904), 162 Ind. 568, 70 N. E. 980.

Koenig v. Flynn (1931, Supreme Court, N. Y.), Appendix T herein, page 74.

Moran v. Bowley (1931, Circuit Court, Illinois), Appendix S herein, page 66.

See also cases cited at page 31 hereof.

It may be noted, too, that the question of interference by the federal courts with a sovereign state is not present. The court below is of the opinion that the power of the legislature is derived solely from the federal government and that the exercise of the power is subject to regulation by federal law. Moreover, either under this theory, or the theory that the power is inher-

ent and reserved in the states, we still have the situation that there is, in the case at bar, no action by a sovereign state. At best, we have only the action of the legislature; indeed it may be truly said we have action by a part of the legislature only. As against this action of the legislative department of the government, or part of it, we have the positive veto of the executive branch of the government, and an avowed intent on the part of the Governor to oppose and defeat the action of the legislative department. The action of the legislature is no more the action of the sovereign state than is the action of the Governor. Nor is the determination of the Supreme Court of the State binding upon this Court; for the reason among others that the exercise of the power to divide the state, regardless of its source, is subject to the provisions of the federal Constitution and to regulation by Congress.

Therefore the questions whether or not the power was exercised by the "legislature" within the meaning of Art. I, Sec. 4 (U. S. Const.), and whether the exercise of the power is within, or complies with, such federal constitutional provisions and statutory law, are federal questions; and no decision by a state court can preclude this Court from determining these questions.

This Court has stated that when essential to the enforcement of rights asserted under the federal Constitution, it will review the decision of a state court.

Beidler v. So. Car. Tax Comm'n (1930), 282 U. S. 1, 51 Sup. Ct. 54, 75 L. Ed. 69.

Mitchell v. Clark (1884), 110 U. S. 633, 4 Sup. Ct. 170, 28 L. Ed. 279.

Carter v. Texas (1900), 177 U. S. 442, 20 Sup. Ct. 687, 44 L. Ed. 839.

Rogers v. Hennepin County (1916), 240 U. S. 184, 36 Sup. Ct. 265, 60 L. Ed. 594.

California v. Deseret Water Co. (1917), 243 U. S. 415, 37 Sup. Ct. 394, 61 L. Ed. 821.

Blodgett v. Silbermann (1928), 277 U. S. 1, 48 Sup. Ct. 410, 72 L. Ed. 749.

People v. Baldwin (1930), 341 Ill. 604, 174 N. E. 51.

CONCLUSION.

It is therefore respectfully submitted that the case at bar is one calling for the exercise, by this Court, of its supervisory powers; in order that a question of nation-wide importance shall be determined; in order that the practice of political gerrymandering shall be authoritatively stamped as disapproved; and to correct error of the Supreme Court of the State of Minnesota. That to such end a Writ of Certiorari should be granted and this Court should review the decision of the Supreme Court of the State of Minnesota and finally reverse it.

Respectfully submitted,

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APPENDIX.

[*Note: The Appendices begin with E, to avoid confusion with Exhibits A and B, and Appendices C and D, in the Record. There are no omissions. Because the question in the case at bar is new, in some aspects at least, we have set out, for the information of the Court, some material which would not otherwise be included here. But we have attempted to present only important and relevant material and have condensed it as much as possible without destroying its value to the Court. All italics used herein are ours.*]

APPENDIX E.

United States Constitution—Article I, Sec. 4.

Sec. 4. The times, places and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing senators.

APPENDIX F.

United States Constitution—Amendment XIV.

Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Sec. 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for president and vice president of the United States, representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

* * * *

Sec. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX G.

Table of Congressional Statutes, dealing with the subjects of: (1) Taking the Federal Census; (2) Apportioning Among the Several States the Total Number of Representatives in Congress; and (3) Regulating the Manner and Method of Laying Out Congressional Districts within the Several States.

Census	*Apportionment*	*Title*	*Remarks*
1790	1792	1 St. L. 253	Deals only with Subject (2) above
1800	1802	2 St. L. 128	" " " (2) "
1810	1811	2 St. L. 669	" " " (2) "
1820	1822	3 St. L. 651	" " " (2) "
1830	1832	4 St. L. 516	" " " (2) "
1840	1842	5 St. L. 491	Deals with (2) and also with (3) above. Section 2 requires the districts to be contiguous as to territory.
1850	1852	(9 St. L. 428 (10 St. L. 25	Deals only with Subject (2) above
1860	1862	12 St. L. 353	" " " (2) "
1870	1872	17 St. L. 28, 192	Deals with (2) and (3)—Districts to be "prescribed by law"—to be equal in number of inhabitants and contiguous as to territory.
1880	1882	22 St. L. 55	Deals with (2) and (3)—Districts to be contiguous—and equal in number of inhabitants. For the first time a repealing clause is included, viz.: all inconsistent acts.

Census	Apportionment	Title	Remarks
1890	1891	26 St. L. 735	Deals with (2) and (3)—Districts to be "prescribed by law," to be equal in number of inhabitants and contiguous as to territory.
1900	1901	31 St. L. 733	Deals with (2) and (3)—to be equal in number of inhabitants and contiguous as to territory. Provides that where the number of Representatives for a State is decreased, they shall run at large unless new districts are laid out before the next election.
1910	1911	37 St. L. 13	Deals with (2) and (3)—Districts to be equal as to population, contiguous, and "prescribed by law"—and now mentioned for the first time—compact as to territory. Provision in case of decrease as in 1901 Act. (Appendix H.)
1920			No statute enacted.
1930	1929	46 St. L. 26	Deals only with (1) and (2)—Repealing clause as to inconsistent acts. (Appendix J.)

[*Note—Until 1929 all Census Acts, Subject (1) supra, were separate and passed prior to Apportionment Acts, Subject (2).*]

APPENDIX H.

The Act of August 18th, 1911 (37 St. L. 13).

Chap. 5.—An Act for the apportionment of Representatives in Congress among the several states under the Thirteenth Census.

Be It Enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That after the third day of March, 1913, the House of Representatives shall be composed of four hundred thirty-three members, to be apportioned among the several states as follows:

[*Here follows a list of the States with the number of Representatives allotted to each. Minnesota has ten.*]

Sec. 2. [Provision is made for the territories of Arizona and New Mexico and providing, in the event of their admission to the Union, that their Representatives shall be in addition to the 433 provided for in Section 1.]

Sec. 3. That in each State entitled under this apportionment to more than one Representative, the Representatives to the Sixty-third *and each subsequent Congress* shall be elected *by districts* composed of *a contiguous and compact territory, and containing as nearly as practicable an equal number of inhabitants.* The said districts shall be equal to the number of Representatives to which such State may be entitled in Congress, no district electing more than one Representative.

Sec. 4. That in case of an increase in the number of Representative in any State under this apportionment such additional Representative or Representatives shall be elected by the State at large and other Representatives by the districts *now prescribed by law* until such state shall be redistricted *in the manner provided by the laws thereof* and in accordance with the rules enumerated in Section three of this Act; and if there be no change in the number of Representatives from a State, the Representatives thereof shall be elected from the districts *now prescribed by law* until such State shall be redistricted as herein prescribed.

Sec. 5. [Provides that where Congressmen are to be elected at large, they shall be elected in the same man-

ner as candidates for governor, unless otherwise provided by laws of the State.]

APPENDIX I.

An Act to Consolidate, Codify, and Set Forth General and Permanent Laws of the United States in Force December Seventh, One Thousand Nine Hundred and Twenty-five.

(Act of June 30, 1926, c. 713, 44 Stat. 773.)

Be It Enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That the fifty titles hereinafter set forth are intended to embrace the laws of the United States, general and permanent in their nature, in force on the 7th day of December, 1925, compiled into a single volume under the authority of Congress, and designated "The Code of the Laws of the United States of America."

Sec. 2. In all courts, tribunals, and public offices of the United States, at home or abroad, of the District of Columbia, and of each State, Territory, or insular possession of the United States—

(a) The matter set forth in the Code, evidenced as hereinafter in this section provided, shall establish *prima facie* the laws of the United States, general and permanent in their nature in force on the 7th day of December, 1925; but nothing in this Act shall be construed as repealing or amending any such law, or as enacting as new law any matter contained in the Code. In case of any inconsistency arising through omission or otherwise between the provisions of any section of this Code and the corresponding portion of legislation heretofore enacted effect shall be given for all purposes whatsoever to such enactments * * *.

[Note: The United States Code incorporates Sections 3 and 4 of the foregoing Act of 1911 under Title 2—The Congress, Chapter 1; Election of Senators and Representatives, omitting certain material indicated by stars, viz.:]

Sec. 3. Election by districts.—In each State entitled under this apportionment to more than one Representative, the Representatives to* Congress shall be elected by districts composed of a contiguous and compact territory and containing as nearly as practicable an equal number of inhabitants. The said districts shall be equal to the number of Representatives to which such State may be entitled in Congress, no district electing more than one Representative.

Sec. 4. Additional Representatives at Large.—In case of an increase in the number of Representatives in any State under this apportionment such additional Representative or Representatives shall be elected by the State at large and the other Representatives by the districts **prescribed by law *on August 8, 1911,* until such State shall be redistricted in the manner provided by the laws thereof and in accordance with the rules enumerated in section three***; and if there be no change in the number of Representatives from a state, the Representatives thereof shall be elected from the districts**** prescribed by law *on August 8, 1911,* until such State shall be redistricted as herein prescribed.

*"the Sixty-third and each subsequent"—is omitted.

**"now"—is omitted.

***"of this Act"—is omitted.

****"now"—is omitted.

[Note:—The matter in italics is new in the Code; and was not in the 1911 Act.]

APPENDIX J.

The Act of 1929, 46 St. L. 26, June 18, 1929.

Chap. 28.—An Act to Provide for the Fifteenth and Subsequent Decennial Censuses and to Provide for the Apportionment of Representatives in Congress.

Secs. 1 to 20, inclusive. [*Provide for the taking of the 1930 Census, outline the machinery, designate the federal officials, their duties, etc.*]

Sec. 21. That the Act establishing the permanent Census Office, approved March 6, 1902, and Acts amendatory thereof and supplemental thereto, except as are herein amended, shall remain in full force. That an Act entitled "An Act to provide for the fourteenth and subsequent decennial censuses," approved March 3, 1919, and all other laws and parts of laws inconsistent with the provisions of this Act are hereby repealed.

Sec. 22. (a) On the first day, or within one week thereafter, of the second regular session of the Seventy-first Congress and of each fifth Congress thereafter, the President shall transmit to the Congress a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the fifteenth and each subsequent decennial census of the population, and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives made in each of the following manners:

(1) By apportioning the then existing number of Representatives among the several States according to the respective numbers of the several States as ascertained under such census, by the method used in the last preceding apportionment, no State to receive less than one Member;

(2) By apportioning the then existing number of Representatives among the several States according to the respective numbers of the several States as ascertained under such census, by the method known as the method of major fractions. No State to receive less than one Member; and

(3) By apportioning the then existing number of Representatives among the several States according to the respective numbers of the several States, as ascertained under such census, by the method known as the method of equal proportions, no State to receive less than one Member.

(b) If the Congress to which the statement required by subdivision (a) of this section is transmitted, fails to enact a law apportioning Representatives among the several States, then each State shall be entitled, in the second succeeding Congress and in each Congress thereafter until the taking effect of a reapportionment under this Act or subsequent Statute, to the number of Representatives shown in the statement based upon the method used in the last preceding apportionment. It shall be the duty of the Clerk of the last House of Representatives forthwith to send to the executive of each State a certificate of the number of Representatives to which such State is entitled under this section. In case of a vacancy in the office of Clerk, or of his absence or inability to discharge this duty, then such duty shall devolve upon the officer who, under Sections 32 or 33 of the Revised Statutes, is charged with the preparation of the roll of Representatives-elect.

(c) This section shall have no force and effect in respect to the apportionment to be made under any decennial census unless the statement required by subdivision (a) of this section in respect of such census is transmitted

to the Congress within the time prescribed in subdivision (a).

[*Note: The preceding Section No. 22 has been incorporated into the permanent Code of the United States Laws as Title 2, Section 2 (a)*].

APPENDIX K.

CONGRESSIONAL RECORD.

Vol. 71—Part 2, p. 2279.

"* * * * Mr. Reed of New York. Yes; I will read the amendment.

Mr. Montague. So that it may appear in the Record?

Mr. Reed of New York. That is what I plan to do. At the end of the bill, if the bill should not be emasculated by removing some of the other sections, I shall introduce this as Section No. 23.

'Nothing in this act contained shall be construed to prevent the legislature of any state (subject, however, to the initiative and referendum law in any state wherein such a law exists), at any time after the approval of this act, in order to secure contiguous and compact territory and equalization of population in accordance with the rules enumerated in Section 3 of the apportionment act, approved August 8, 1911, by concurrent resolution, redistricting the state for the purpose of electing Representatives to Congress, and upon each and every such redistricting the Representatives to Congress shall in any such state be elected from the new districts so formed.' "

Vol. 71—Part 3, Pages 2363-4.

"* * * * Mr. Reed of New York. Mr. Chairman, I offer the following amendment which I send to the desk.

The Clerk reads as follows:

Page 18, line 9, after the word 'section,' insert a new section as follows:

'Section 23. Nothing in this act contained shall be construed to prevent the legislature of any States (subject, however, to the initiative and referendum law in any State wherein such a law exists), at any time after the approval of this act, in order to secure contiguous and compact territory and equalization of population in accordance with the rules enumerated in Section 3 of the apportionment act, approved August 8, 1911, by concurrent resolution, redistricting the State for the purpose of electing Representatives to Congress, and upon each and every such redistricting the Representatives to Congress shall in any such State be elected from the new districts so formed.'

Mr. O'Connor of New York. Mr. Chairman, I make the point of order against the amendment. It is not germane to the bill. I would be very glad to have the Chair hear me if the Chair has any doubt about it.

The Chairman. The Chair had his attention called to this amendment by the gentleman from New York (Mr. Reed), who placed it in the Record yesterday, and it will be found on Page 2279. The Chair will ask the gentleman from New York who offered the amendment whether he can point to any portions in the pending bill which refer to the matter of the redistricting of the States by the legislatures of the States?

Mr. Reed of New York. Mr. Chairman, we are dealing with a reapportionment act, and under Article 1, Section 4, of the Constitution it is provided as follows:

The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations except as to the places of choosing Senators.

That gives us authority and makes it germane to this bill.

The Chairman. The gentleman's citation of the Constitution of the United States, the Chair thinks, would have no bearing on the pending bill. We are not considering any amendment to the Constitution. We are considering the present bill and amendments thereto. The Chair desires to give the gentleman an opportunity to show how the pending bill in any way relates to the redistricting of the States by the legislatures, if he can. The Chair has not been able to find anything in the bill which would relate to that subject."

Vol. 71—Part 3, Pages 2443-2444.

"• • • • Mr. Reed of New York. Mr. Chairman, prior to August 8, 1911, the apportionment act of that year, it was always provided in the matter of redistricting that this should be done by the legislature of the State in accordance with Article 1, Section 4, of the Constitution of the United States, which gives the legislature the power to fix the time and places, but reserves to the Congress the right at any time to make, alter, or amend such regulations. In 1911, in order to take care of a situation in Ohio and in some other States where they had the referendum, they changed this language that had been used for more than half a century to the language that it should be by the laws of the State.

Now, here is the practical situation under the law as it now stands. Unless my amendment is passed you would have this situation; after the enumeration is made it will probably develop in my State that instead of 43 Members of Congress we will have 42, and this means that if there is a deadlock between our legislature and our governor 42 Members of the Congress would have to

be elected at large. Every one of them could be nominated in the City of New York, and I am casting no reflection, but these men would not accurately reflect the sentiment of the rural section of the great State touching prohibition, immigration, and other important public questions.

Mr. Cooper of Wisconsin. Will the gentleman yield for a question?

Mr. Reed of New York. Yes.

Mr. Cooper of Wisconsin. As I heard the amendment read, it provides that the legislature may by concurrent resolution take this action at any time after the approval of this act.

Mr. Reed of New York. Yes; at any time after the approval of the act.

Mr. Cooper of Wisconsin. This bill is supposed to go into effect, or you desire it to go into effect during this special session, which would be before the census is taken. Therefore, this proposed amendment would provide that without the governor's signature the legislature could redistrict the State at any time after the signing of this bill and before the census has been reported.

Mr. Reed of New York. Something that should have been done nine years ago and has not been done. The legislature should have the right to do it now, if required to insure justice to the people of my State.

I now want to call your attention to the point of order, and I ask you gentlemen, if you have the bill before you, to turn to Section 21 of the bill. The point of order has been made that this proposed amendment is not germane and that it does not relate to the subject in any shape or form. Let us see what has happened. I think every one of you has an interest in this question.

Mr. Johnson of Texas. Mr. Chairman, a parliamen-

tary inquiry. Is the gentleman addressing his argument on the point of order to the House or to the Chairman of the committee?

The Chairman. Of course, it is being addressed to the Chair and the Chair is hearing the gentleman.

Mr. Johnson of Texas. It seemed to me the gentleman was making an argument to the House rather than to the Chair, and I did not think the House ought to pass on the question at this time.

The Chairman. The Chair is following the gentleman, both with respect to the present bill and the law to which the gentleman is referring.

Mr. Reed of New York. I realize that the point of order is well taken. I just hope the House will be patient with me. I do not think you need to feel any particular alarm about what may happen when I get through, but I just want to call your attention to a very important and practical question touching representation.

I want you to read the last sentence in Section 21:

> That the act entitled 'An Act to provide for the fourteenth and subsequent decennial censuses,' approved March 3, 1919, and all other laws and parts of laws inconsistent with the provisions of this act are hereby repealed.

This was never intended to be in the present bill. This was in the Senate bill. They never changed it. Perhaps, under a strict construction by the courts they would not have to change it, but it leaves it open to considerable doubt, because the language is 'all other laws and parts of laws inconsistent with the provisions of this act are hereby repealed,' and this includes Section 22.

It happens that if it is construed in this way it means

that Sections 3, 4, and 5 of the apportionment act of August 8, 1911, which provides as follows:

That in each State entitled under this apportionment to more than one Representative, the Representatives to the Sixty-third and each subsequent Congress shall be elected by districts composed of a contiguous and compact territory, and containing as nearly as practicable an equal number of inhabitants. The said districts shall be equal to the number of Representatives to which such State may be entitled in Congress, no district electing more than one Representative.

Section 4. That in case of an increase in the number of Representatives in any State under this apportionment such additional Representative or Representatives shall be elected by the State at large and the other Representatives by the districts now prescribed by law until such State shall be redistricted in the manner provided by the laws thereof and in accordance with the rules enumerated in Sec. 3 of this act; and if there be no change in the number of Representatives from a State the Representatives thereof shall be elected from the districts now prescribed by law until such State shall be redistricted as herein prescribed—

Mr. Crowther. Will the gentleman yield?

Mr. Reed of New York. Yes.

Mr. Crowther. Does the gentleman from New York think that Sections 3 and 4 in the 1911 Act are really inconsistent with the present act?

Mr. Reed of New York. They are now the law and what I am pointing out to the House is that under Section 21 of this bill there is a possible construction by which they may be repealed, and we will go out to the country with an apportionment act that leaves it absolutely free to the legislature to put in shoestring dis-

tricts, saddlebacked districts and achieve all the vicious things of the gerrymanders in the days of old.

Mr. Crowther. Does not the language in the present bill call attention to the sections that are inconsistent, and I ask the gentleman again whether he considers Sections 3 and 4 inconsistent?

Mr. Reed of New York. I say there is that possible construction.

Mr. Crowther. Oh, possible construction!

Mr. Reed of New York. I will say this, that when we pass an act we should make it as clear as possible, and not leave anything to conjecture.

Mr. Bankhead. Mr. Chairman, a point of order. I do not desire to cut the gentleman from New York off, but he has conceded the point of order made by the gentleman from New York.

He is not discussing the point of order. He is not addressing the Chair. If he desires to be heard further, I think it should be by unanimous consent, because it is not in accordance with the provisions of the rules of the House.

The Chairman. The Chair thinks the point of order is well taken with this exception, that notwithstanding the concession of the point of order by the gentleman from New York that it may be well taken, he then proceeded to claim that the repeal of certain provisions of the prior law might make his amendment in order. The Chair is prepared to rule.

Mr. Reed of New York. I want to say that inasmuch as this bill may be passed repealing the provisions to which I have referred, my amendment proposes to save the situation by making it possible to prevent a deadlock in the legislature. I will yield to the gentleman from Idaho.

The Chairman. The Chair will be glad to hear from the gentleman from Idaho.

Mr. French. Mr. Chairman, I wish to address myself for a moment to the point of order. I have in mind the provision to which the gentleman from New York has referred, namely, the language of Section 21, but I take a different point of view as to the effect of the pending bill upon Sections 3, 4, and 5 of the act of 1911.

What does the pending bill provide? It provides, first, for taking the census; and, second, it provides for an apportionment of Representatives in Congress. The measure carries language, to which the gentleman from New York has referred in Section 21, providing for the repeal of certain specific laws and any other law inconsistent with the pending bill. Evidently the pending bill provides for the repeal of Section 1 of the Act of August 8, 1911. It unquestionably provides for such repeal. I do not think that it provides directly or indirectly for the repeal of other sections of the act.

Now, if that is true, it would seem that the remaining provisions of the Act of 1911 ought to be subject to amendment. That is precisely what is proposed by the amendment offered by the gentleman from New York.

The Act of August 8, 1911, provides for two contingencies in the districting of the different States. One is that in event the representation in the different States should not be disturbed by the census of 1910 and the State legislatures do not undertake to redistrict, then the act itself would provide that the districting in existence at the time of the passage of the act shall continue. The other contingency provided for was in States that would receive additional representation in Congress. The act provides that in such contingency if the States fail to redistrict the number of Representatives gained by

the States over that which they already had would be elected at large.

In the pending bill you are providing a third contingency not referred to in the Act of 1911, namely, the situation that would arise should some States suffer reduced representation. Should any State, as a result of the census and apportionment we are providing for, suffer a reduction in representation, then in the absence of laws in the States providing for new arrangements of districts there would be no provision whatever for election of Representatives in Congress from such States.

So, then, it would seem reasonable that the amendment offered by the gentleman from New York is in point and that it is germane to a portion of an act that we are not repealing, though we are repealing part of such act.

So, bringing the matter to a head, I submit that the pending bill provides for the repeal of Section 1 of the Act of August 8, 1911, as this section is in conflict with definite provisions of the pending bill, but it does not provide for the repeal of Sections 2, 3, 4 and 5. If that is true, it seems to me that the amendment of the gentleman from New York is germane."

Vol. 71—Part 3, Page 2445.

"The Chairman:

"• • • • However, the gentleman from New York (Mr. Reed) now claims that the provision in Section 21 is applicable, which reads as follows:

'That the act entitled 'An Act to provide for the fourteenth and subsequent decennial censuses,' approved March 3, 1919, and all other laws and parts of laws inconsistent with the provisions of this act are hereby repealed.'

The gentleman from New York calls attention to that provision and claims that that relates to certain sections of the Act of August 8, 1911, which bore on the subject of redistricting by the States, but it seems to the Chair that the gentleman overlooked the effect of the words—'all other laws and parts of laws inconsistent with the provisions of this act are hereby repealed.'

If there is nothing in this bill relating to redistricting, then there can be nothing in it which is inconsistent with the Act of 1911 on that subject. There can be no repeal by this bill of any law or parts of laws which are not inconsistent with that act on the subject of redistricting by State legislatures."

(Italics ours.)

APPENDIX L.

Minnesota Constitution.

Art. IV, Sec. 23. Census enumeration—apportionment. The legislature shall provide *by law* for an enumeration of the inhabitants of this State in the year one thousand eight hundred and sixty-five, *and every tenth year thereafter.* At their first session after each enumeration so made, and also at their first session after each enumeration made by the authority of the United States, the legislature shall have the power *to prescribe* the bounds of congressional, senatorial and representative districts, and to apportion anew the Senators and Representatives among the several districts *according to the provisions of Section Second of this article.*

Art. IV, Sec. 2. Apportionment of members. The number of members who compose the Senate and House of Representatives *shall be prescribed by law,* but the representation in the Senate shall never exceed one

member for every 5,000 inhabitants, and in the House of Representatives one member for every 2,000 inhabitants. The representation in both houses shall be apportioned *equally* throughout the different sections of the State, *in proportion to the population thereof*, exclusive of Indians not taxable *under the provisions of law.*

APPENDIX M.

The Legislative Power of the State of Minnesota.

Organic Act of Minnesota—An Act to establish the Territorial Government of Minnesota [passed March 3, 1849].

Sec. 4. And be it further enacted, That the legislative power and authority of said Territory shall be vested in the Governor and a legislative assembly. • • •

Sec. 6. And be it further enacted, That the legislative power of the Territory shall extend to all rightful subjects of legislation, consistent with the Constitution of the United States and the provisions of this act. • • •

Sec. 20. And be it further enacted, That *every bill* which shall or may pass the Council and House of Representatives, *shall, before it becomes a law,* be presented to the Governor of the Territory; if he approve, he shall sign it; but if not he shall return it, with his objections, to the house in which it originated; which shall cause the objections to be entered at large upon their journal, and proceed to reconsider it. If, after such reconsideration, two-thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall also be reconsidered, and if approved by two-thirds of that house *it shall become a law;* • • • If any bill shall not

be returned by the Governor within three days (Sundays excepted) after it shall have been presented to him, the same *shall be a law* in like manner as if he had signed it, unless the legislative assembly, by adjournment, prevent it, in which case *it shall not become a law.*

MINNESOTA CONSTITUTION.

Art. 4, Sec. 11. *Every bill* which shall have passed the Senate and House of Representatives, in conformity to the rules of each House and the joint rules of the two houses, *shall, before it becomes a law, be presented to the Governor of the State.* If he approves, he shall sign and deposit it in the office of the Secretary of State for preservation, and notify the house where it originated of the fact. But if not, he shall return it, with his objections, to the house in which it shall have originated; when such objections shall be entered at large on the journal of the same, and the house shall proceed to reconsider the bill. If, after such reconsideration, two-thirds of the house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered; and if it be approved by two-thirds of that house *it shall become a law.* * * * *If any bill shall not be returned* by the Governor within three days (Sundays excepted) after it shall have been presented to him, *the same shall be a law* in like manner as if he had signed it, unless the legislature, by adjournment within that time, prevents its return; in which case *it shall not be a law.* The Governor may approve, sign and file in the office of the Secretary of State, within three days after the adjournment of the legislature, any act passed during the last three days of the session, and the same *shall become a law.* * * *

Art. 4, Sec. 12. * * * *Every order, resolution or vote requiring the concurrence of the two houses* (except such as relate to the business or adjournment of the same) shall be presented to the Governor for his signature, and *before the same shall take effect,* shall be approved by him, or being returned by him with his objections, shall be repassed by two-thirds of the members of the two houses, *according to the rules and limitations prescribed in case of a bill.*

[*Note: The Act Authorizing the State Government Approved February 26, 1857, and the Constitutional Convention held July 13, 1857, and the adoption and ratification of the proposed Constitution of the State of Minnesota, October 13, 1857, and the Act of Admission into the Union, May 11, 1858, incorporated the provisions of the Organic Act into the present State Constitution.*

The Act of Admission recites the foregoing facts and states that the government adopted under the State Constitution is in form a Republican government.

Sec. 2 of the Act of Admission provides for two Representatives in the Federal Congress, and

Sec. 3 of the Act of Admission provides among other things that "all the laws of the United States which are not locally inapplicable shall have the same force and effect within that State as in other States of the Union."]

APPENDIX N.

State Legislative Districts.

The Organic Act of Minnesota [March 3, 1849].

Sec. 4. * * * And the persons thus elected to the legislative assembly shall meet at such place on such day as the governor shall appoint, but thereafter the

time, place and manner of holding and conducting *all elections by the people,* and the apportioning of the representation in the several counties or districts to the council and house of representatives, according to the population, *shall be prescribed by law,* as well as the day of the commencement of the regular session of the legislative assembly; provided, that no one session shall exceed the term of sixty days.

Act Authorizing a State Government [February 26, 1857].

Sec. 3. [Provides for representation in the State legislature "in all respects in conformity with the laws of said Territory regulating the election of representatives."]

Minnesota Constitution.

Art. 4, Sec. 23. [Set out as Appendix L, *supra.*]

Art. 4, Sec. 24.—Senatorial Districts—Terms of Office of Senators and Representatives.—The senators shall be chosen by single districts of convenient, contiguous territory, at the same time that the members of the house of representatives are required to be chosen, and in the same manner; * * * The terms of office of senators and representatives shall be the same as now prescribed by law * * *.

Art. 4, Sec. 2.—Apportionment of members [set out in Appendix L, *supra*].

APPENDIX O.

Congressional Districts.

Organic Act [March 3, 1849].

Sec. 14. And be it further enacted, That *a delegate of the House of Representatives of the United States*

to serve for the term of two years, may be elected by the voters qualified to elect members of the legislative assembly, * * * The first election shall be held at such times and places and be conducted in such manner as the governor shall appoint and direct; and that *at all subsequent elections, the times, places and manner of holding the election shall be vrescribed by law.* * * *

Act of Admission into the Union [May 11, 1858].

Sec. 2. And be it further enacted, that said state shall be entitled to *two representatives in congress,* until the next apportionment of representatives among the several states.

Minnesota Constitution—

Art. 4, Sec. 23)

Art. 4, Sec. 2) [Set out in Appendix L, *supra.*]

APPENDIX P.

Minnesota Laws of 1931, Chap. 105.

Chap. 105, House File 852.—An Act to Amend Mason's Minnesota Statutes 1927, Section 651, relating to County Commissioner's Districts. Be It Enacted by the Legislature of the State of Minnesota:

Sec. 1. Boundaries of Commissioner District.—That Mason's Minnesota Statutes of 1927, Section 651, be amended to read as follows:

(651.) Each county shall be divided into as many districts, numbered consecutively, as it has members of the board. In all counties such districts shall be bounded by town, village, ward, or precinct lines, shall be composed of contiguous territory and contain as nearly as practicable an equal population. * * *

APPENDIX Q.

TABLE OF MINNESOTA DISTRICTING ACTS.

1849	Organic Act, Sec. 14	)
1858	Act of Admission into the Union, Sec. 2	) See Appendix O.
1858	Chap. 83	
1872	Chap. 21	
1881	Chap. 128	
1891	Chap. 3	
1901	Chap. 92	
1913	Chap. 513 [Mason's Minnesota Code 1927, Sections 13 to 23, inclusive].	
1929	Chap. 64 [Amending Chap. 513 as to the fifth and tenth districts only.]	
1931	House File 1456.	

APPENDIX R.

TABLE OF STATE REDISTRICTING METHOD.

State	*Method*	*Remarks*
Alabama	Statute	Question never raised.
Arizona		One Representative. Question never raised.
Arkansas	Statute	1901—Act 145 at p. 31, Crawford & Moses' Digest.
California	Statute	Section 117, Political Code. Chap. 181, Statutes of 1931. Question of the applicability of a referendum provision of State Constitution, §1, Art. 4 on the reapportionment of 1931 raised but petition for referendum failed to obtain proper number of signatures. Attorney General of California opposed to redistricting by any means other than statute.

State	*Method*	*Remarks*
Colorado	Statute	Question never raised.
Connecticut . . .	Statute	Question never raised.
Delaware		One Representative. Question never raised.
Florida	Statute	Compiled General Laws 1929, Art. 3.
Georgia	Statute	Question never raised.
Idaho	Statute	Question never raised.
Illinois	Statute	Question never raised.
Indiana	Statute	*State v. Bailey*, 16 Ind. 46; *May v. Rice*, 91 Ind. 546. Question never raised. 1891 bill passed over Governor's veto. 1895 bill passed over Governor's veto.
Iowa	Statute	Constitutional provision Art. 3, §37, against subdividing counties and forming congressional districts and against districts including non-adjoining counties.
Kansas	Statute	Question never raised.
Kentucky	Statute	Question never raised.
Louisiana	Statute	Question never raised. Act 160, p. 294, Laws of 1912.
Maine	Statute	Question never raised. Public Laws 1931, Chap. 245. Resolution requiring approval of Governor has the effect of law. Difference between resolution and other act is only on the question of number of readings before the Legislature.
Maryland	Statute	Code of Public Laws 1924, Art. 33, §163 of 172.
Massachusetts. .	Statute	Laws of 1931, Chap. 438.
Michigan	Statute	Question never raised.
Minnesota	Statute (up to 1931)	Statute vetoed 1931.
Mississippi . . .	Statute	Question never raised.
Missouri	Statute	Constitutional provision for referendum. Attorney General's opinion opposed to redistricting other than by law, including referendum provision.

State	*Method*	*Remarks*
Montana	Statute	Question never raised.
Nebraska	Statute	Question never raised.
Nevada	Statute	One Congressman.
New Hampshire	Statute	Question never raised.
New Jersey	Statute	Question never raised.
New York . . . . . (up to 1931)	Statute	Concurrent Resolution of Senate and Assembly of April 10, 1931.
New Mexico . . .	Statute	One Representative.
North Carolina.	Statute	Question never raised.
North Dakota . .	Statute	Question never raised.
Ohio	Statute	See *Davis v. Hildebrandt*, 241 U. S. 565; 103 Ohio Laws 567.
Oklahoma	Statute	Question never raised.
Oregon	Statute	Question never raised.
Pennsylvania . .	Statute	Act 361, approved June 27, 1931.
Rhode Island . .	Statute	Question never raised.
South Dakota . .	Statute	See *Schrader v. Polley*, 26 S. D. 5, 127 N. W. 848.
Tennessee	Statute	Question of joint resolution authorizing constitutional convention, but not involving districting, now pending.
Texas	Statute	Concurrent resolutions need executive approval, Art. 4, §15, Constitution of Texas.
Utah	Statute	Constitutional provision for districting, §1, Art. 9.
Vermont	Statute	Question never raised.
Virginia	Statute	Constitutional provision for districting by law. Section 55, State Constitution.
Washington . . .	Statute	Question never raised.
West Virginia . .	Statute	See *Re: Boyd Adkins*, 83 W. Va. 673. Joint resolution not effective as a statute.
Wisconsin	Statute	Legislative committee appointed to investigate proper procedure. Statute introduced in the Assembly and passed—Bill No. 998-a. Adjournment before further action.
Wyoming	. . . . .	One Representative.

APPENDIX S.

In the Circuit Court, September term, A. D. 1931. State of Illinois, ss., county of Boone. Frank T. Moran and G. E. Casper, complainants, v. William Bowley, County Clerk of Boone County, Ill., and William J. Stratton, Secretary of State of the State of Illinois, Defendants.

Findings by the Court.

The above entitled cause, a bill of complaint attacking the State congressional apportionment act passed by the legislature in 1931 and approved July 2, 1931, and praying a perpetual injunction against the defendants and each of them, restraining them from expending any more moneys derived from taxes in carrying out and enforcing said legislative act on the ground that said act is unconstitutional and void, coming on to be heard; and the complainants having twice amended said bill and the defendants having filed a general demurrer to the bill of complaint as amended, and said demurrer having been fully heard on the part of the defendants, argued by the attorney general of the State of Illinois and by Alexander J. Strom, State's attorney of Boone County, and on behalf of the complainants by Mr. Roy F. Hall, of Rockford, Ill.; and the court being fully advised in the premises;

It appears that the Legislature of Illinois did, in 1931, by a legislative act, sufficient in form, seek to divide the State of Illinois into 27 congressional districts for the election of Congressmen to represent the people of the State of Illinois and the respective districts in the lower House of Congress of the United States. The demurrer admits all facts well pleaded in the bill of complaint

and no exception has been taken to any language in the bill. Defendants contend that the bill will not lie, because it is an attempt by the judiciary to restrain executive, political, and administrative functions, citing *Fletcher v. Tuttle* (151 Illinois 41).

At the outset it is fitting to quote the language of Mr. Justice Cartwright in *The People v. Hutchinson* (172 Illinois 494):

> The duty of passing upon the constitutionality of an act of the legislature has always been regarded as a delicate one, to be entered upon with hesitation and caution, and to call for most deliberate and careful attention. The legislative and executive branches of the Government have necessarily construed the Constitution and determined that they may rightfully exercise the power assumed by the passage of the act, and their decision is entitled to the highest respect. In the consideration of the question involved the presumption is in favor of the constitutionality of the act, and it will only be set aside in case of a clear infringement of the Constitution.

Courts of equity have no power or jurisdiction to interfere with a political, legislative, or administrative function as such, but can deal only with property or civil rights. Unless a property right is involved, the bill must be dismissed. But the bill does not seek to enjoin or restrain a legislative, executive, or political function. It seeks to restrain the mismanagement and waste of public funds which are the property of the taxpayer, and is supported by a long line of decisions as old as the State. In *Fergus v. Russell* 270 Ill. 314; *Jones v. O'Connell*, 266 Ill. 447, and many other cases the rule is laid down:

"We have repeatedly held that taxpayers may resor to a court of equity to prevent the misapplication o public funds, and that this right is based upon the tax payers' equitable ownership of such funds and thei liability to replenish the public treasury for the defic ency which would be caused by the misappropriation," citing *Colton v. Hanchett,* 13 Ill. 615; *Perry v. Kinnear* 42 id. 160; *Chestnutwood v. Hood,* 68 id. 132; *Jackson v. Norris,* 72 id. 364; *McCord v. Pike,* 121 id. 288; *Littler v. Jayne,* 124 id. 123; *Stevens vs. St. Mary's Training School,* 144 id. 366; *City of Chicago v. Nichols,* 17 id. 97; *Adams v. Brenan,* 177 id. 194; *Burke v. Snively* 208 id. 328; *Jones v. O'Connell,* 266 id. 443.

The bill seeks to restrain the misapplication of pub lic funds in an illegal election under an act claimed to b unconstitutional. It is argued in this case, as it wa argued in *Fletcher v. Tuttle, supra,* that a primary an election of all State, district, and county officers must b held in 1932 in any event, and that the extra expense o holding a primary and election for Congressmen, na tional delegates, and electors would make no extr charge or expense, and therefore no public funds ar involved in this cause.

The vice of this argument is, that if Congressmen i Illinois should be elected under a void and unconstitu tional act the presumption is that they would be hel to be void and illegal officers, and the State would b called upon to hold a special election for their substi tutes who would be constitutionally elected at a larg expense to the State, which the taxpayers would b called upon to replenish to the public treasury, the legiti mate expenses for which have been wasted and lost b an election under a void act.

In *Fletcher v. Tuttle, supra,* there was no attempt made to prevent the waste or mismanagement of any fund, but the complainants sought only to protect his personal and political rights as a candidate for the legislature. The complainants in their bill, by allegations proper and sufficient, ground an equity upon the protection of the public funds.

It is averred in paragraph 14 of the bill, and admitted by the demurrer, that in the city of Chicago the congressional lines split wards and precincts, and the result is that in that city many of the precincts now formed are in two congressional districts. It can not be presumed that before the next election or at any time the proper governing authorities will remap the precincts so that each precinct will be wholly and entirely within a single congressional district. As the bill now stands the voters of many precincts will be deprived of the privilege of casting their vote for congressional officers. The law as enacted is not a complete, workable law. I know of no method by which the voters in one precinct could be separated and vote for separate congressional officers.

In *People v. Hutchinson* (172 Ill. 502), the Supreme Court in passing upon a senatorial apportionment act said:

> This act of May 1[illegible] 1893, is conceded to have been an unconstitutional and void act, which never became a law for the reason that it omitted the town of Riverside, a populous town in Cook County, which was not included in any of the senatorial districts and was deprived of representation.

Split precincts are equally deprived of representation.

But the main question in this case is whether the act as formed violates section 18 of article 2 of the consti-

tution of 1870, providing: "All elections shall be free and equal." This provision of the Constitution has been construed by the supreme court in *The People v. Emmerson*, 333 Ill. 611, as follows:

> This has been held by this court to mean that every qualified voter may freely exercise the right to cast his vote without restraint or coercion of any kind, and that his vote when cast shall have the same influence as that of any other voter. (*McAlpine v. Dimick*, 326 Ill. 240; *People v. Fox*, 294 id. 263; *Rouse v. Thompson, supra; People v. Election Comrs.*, 221 Ill. 9.)

In *McAlpine v. Dimick* (326 Ill. 249), the court said:

> Equal individual suffrage is the right of every American man or woman, is at the foundation of our scheme of government, and the free and equal exercise of that right, unhampered by any law by which the influence of the votes of any class of voters may be increased or decreased in relation to the votes of any other class, is essential to the preservation of the liberties of the people. A fraction of difference in the value of a vote may be small, but it can never be trivial, for when it is multiplied by a million it becomes a resistless force. The power to make a distinction between voters would itself be resistible. This same element of inequality of representation in a party convention was held fatal in the Fox case to the primary election law of 1919 and must have the same effect on the law of 1910.

This language has a deeper meaning than the use of the words at first blush would seem to indicate.

Cooley on Constitutional Limitations (5th Ed.), pages 44 and 45, sets out some of the principles to be established in the formation of a republican form of govern-

ment and what their constitutions should contain. He says:

> Certain things are to be looked for in all these instruments; though even as to these there is great variety, not only of substance but also in the minuteness of their provisions to meet particular cases.

He mentions some:

> 1. Those declaratory of the general principles of republican government, such as that all freemen when they form a social compact are equal, and no man or set of men is entitled to exclusive, separate public emoluments or privileges from the community, but in consideration of public services; that absolute, arbitrary power over the lives, liberty, and property of freemen exists nowhere in a republic, not even in the largest majority; * * * that all elections shall be free and equal; that representation shall be in proportion to population, etc.

With these principles of a republican form of government and the Constitution before me, a glance at the population of the various districts as formed by this legislative act is of interest. The population of the various districts is as follows:

First district	269,989
Second district	329,759
Third district	311,814
Fourth district	232,261
Fifth district	541,785
Sixth district	273,679
Seventh district	311,021
Eighth district	285,891
Ninth district	309,785
Tenth district	295,074

Eleventh district	322,319
Twelfth district	308,416
Thirteenth district	285,499
Fourteenth district	211,948
Fifteenth district	343,293
Sixteenth district	199,104
Seventeenth district	158,738
Eighteenth district	272,505
Nineteenth district	268,656
Twentieth district	299,384
Twenty-first district	261,408
Twenty-second district	213,154
Twenty-third district	276,521
Twenty-fourth district	301,605
Twenty-fifth district	280,854
Twenty-sixth district	227,827
Twenty-seventh district	308,365

An average population in a district should be something over 280,000. These districts are unequal in population, unreasonable, and unjust. For example, in the district where this court is sitting, the fifteenth, it is necessary for 2,116 voters to go to the polls and vote to equal the vote of one person in the seventeenth district.

The fifth district in Chicago contains a population of 541,785, more than 3.4 times the population of the seventeenth district with a population of 158,738. Just why the legislature should disfranchise over 260,000 persons in Chicago and deny them representation in Congress is not plain to be seen. It is shown by the bill that there are 22 districts which have more than one-half more inhabitants than the seventeenth district; there are 14 districts which have more than three-

fourths more inhabitants than the seventeenth district; that there are 10 districts which have more than 90 per cent more inhabitants than the seventeenth district; and that there are four of said districts which have more than double the inhabitants in the seventeenth district.

Our court in *The People v. Thompson*, 155 Ill. 484, has passed squarely on what constitutes an inequality of representation in citing a case in Wisconsin where one senate district contained 30,732 and another district contained 65,952, and also citing a Michigan case where one district contained 97,330 and another district contained only 39,727 population. The court said:

> It would seem plain that in the instances mentioned in the Wisconsin and Michigan cases there was no approximation toward equality in representation, for where one district contained in the one case more than twice and in the other nearly three times the population of another district, the legislature could not at all, in those instances at least, have regarded the injunction of the constitution to make the apportionment "according to the number of inhabitants."

I have no hesitation in holding under the allegations of the bill, which are admitted to be true, that the apportionment act in question violates the meaning and language of the Constitution; is subversive of the spirit and principles of a republican form of government and is unconstitutional and a void act.

The demurrer is overruled.

Defendants may have further time to plead.

The defendant and each of them state they do not desire to plead further, but elect to stand by their demurrer. Accordingly the defendants and each of them

are in default and a decree as prayed for in the bill may be entered against them.

APPENDIX T.

Supreme Court, Albany County. In the matter of the application of Samuel S. Koenig, John J. Knewitz, and William L. Ward for a mandamus order against Edward J. Flynn, Secretary of State of the State of New York. (Supreme Court, Albany County special term, October, 1931.)

Justice Ellis J. Staley, presiding.

Appearances: Abraham S. Gilbert, Esq., and Benjamin L. Fairchild, Esq., attorneys for petitioners; John J. Bennett, Esq., attorney general, attorney for respondent (Henry Epstein, Esq., of counsel). John Godfrey Saxe, Esq., attorney for James A. Farley, chairman of the Democratic State Committee, respondent-intervener (Robert F. Wagner and John J. O'Connor, Esq., of counsel).

MEMORANDUM.

Staley, J.: This application is made for a mandamus order directing the Secretary of State to certify in election notices that 45 Representatives in the House of Representatives in the Seventy-third Congress are to be elected in the congressional districts as defined in a concurrent resolution of the Senate and Assembly of the State of New York.

Section 4 of Article 1 of the Federal Constitution provides:

> The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof;

but the Congress may at any time by law make or alter such regulations except as to the place of choosing Senators.

On Act of Congress approved June 18, 1929, provided for the fifteenth and subsequent decennial censuses and for an apportionment thereunder of Representatives in Congress among the several States. The effect of this census statute and the apportionment made thereunder was an increase in the number of Representatives of the State of New York in the House of Representatives from 43 to 45.

On April 10, 1931, the Assembly and Senate, composing the Legislature of the State of New York, passed a concurrent resolution subdividing the State into 45 congressional districts and therein specified and fixed the boundaries of such districts.

This resolution was not in the form of a bill or law. It was not submitted to the Governor of the State for his approval. Subsequent to its passage it was submitted for filing to the Secretary of State.

The Attorney General has rendered an opinion to the Secretary of State, advising him that such resolution is ineffective to accomplish a redistricting of the State into congressional districts, and for the purpose of this proceeding it is conceded that the Secretary of State will refuse to follow this resolution in his certificate for the election of 1932.

The substantial question involved is whether the Legislature of the State of New York has the power to divide the State into congressional districts by a concurrent resolution not submitted to the Governor of the State for his approval, or whether the Legislature was compelled to make such subdivision by an enactment of law subject to the approval of the Governor.

This question compels a consideration of the meaning of the term "legislature" as used in Section 4 of Article 1 of the Federal Constitution, of the existence of any enactment by Congress under its reserved power altering the constitutional regulation, and the extent of executive participation in the lawmaking power of the State of New York to validate legislative action therein.

> The legislative power of this State shall be vested in the Senate and Assembly. (New York Constitution, Art. 3, Sec. 1.)

Every bill which shall have passed the Senate and Assembly shall before it becomes a law be approved and signed by the Governor, or upon executive disapproval, approved upon reconsideration by two-thirds of the members elected to each house of the Legislature. Any bill not returned by the Governor within 10 days, unless return is prevented by adjournment, shall be a law in like manner as if he had signed it. (New York Constitution, Art. 4, Sec. 9.)

This latter section establishes the necessity of executive action of an affirmative or negative character to give the force and effect of law to enactments of the Legislature. It makes the Governor of the State an essential part of the lawmaking process and power, and establishes the extent of executive participation.

After the census of 1910, the Thirteenth Census, the Congress in accordance with its custom following every census, passed an act which apportioned the members of the House of Representatives among the several States. This act was approved August 11, 1911, and is referred to as the 1911 apportionment act. In addition to the numerical apportionment among the States of the Members of the House of Representatives, it contained provision for Representatives in certain terri-

tories upon their admission as States before apportionment under the next decennial census; it provided that the districts in each State entitled to more than one Representative shall be composed of a contiguous and compact territory and contain as nearly as practicable an equal number of inhabitants; that in case of increase in the number of Representatives in any State, that such additional Representative shall be elected by the State at large, and the others from the existing districts, "until such State shall be redistricted in the manner provided by the laws thereunder," and if no change in number from the existing districts, "until such State shall be redistricted as herein prescribed."

The case of *Davis v. Hildebrandt* (241 U. S. 565) involved those provisions of the 1911 apportionment act in relation to provisions of the Constitution of the State of Ohio granting the right of referendum as a part of the legislative authority of that State. This case held that a redistricting act of Ohio for the purpose of congressional elections was properly submitted for validity to the referendum test, when such was duly invoked, because the enactment of Congress requiring that the redistricting should be made by a State, "in the manner provided by the laws thereof," compels such procedure.

Whatever the inference of this decision may be, it sustained the power of Congress to so deal with congressional elections. It did not define or establish the method of the exercise of the legislative power of that State to regulate congressional elections under the Federal Constitution in the absence of such congressional enactment, but accepted the act as sufficient justification for referendum submission.

Respondents herein contend that the Davis case is controlling here, for the reasons that the provisions of the 1911 apportionment act are still in effect; that they have not been repealed expressly or by implication and that their requirement "in the manner provided by law" is fatal to the method of action by the New York State Legislature reviewed in this proceeding.

With that contention I am constrained to disagree. The Act of 1911 was limited by its title to one for the apportionment of Representatives "under the Thirteenth Census." Its provisions are limited by express language to procedure required, "under this apportionment." It was a temporary enactment designed for a specific purpose which has been performed. Its life has expired. It has been superseded by the apportionment under the 1929 act. Its provisions limited by its language to the apportionment under the Thirteenth Census has no force or application to an apportionment under the Fifteenth Census.

The debates in Congress when the 1929 census and apportionment act was considered, in relation to a proposed amendment thereto, which are urged by the Attorney General as a valued guide to justify judicial determination that the general provisions of the 1911 act are still law, can not be accorded such force and effect. At best they are mere expressions of opinion of individual members that the general provisions of the 1911 act would still prevail after the enactment of the 1929 act, a view which was rejected. Such expressions are not to be accepted by the courts as controlling or competent aids to establish as law a statute which has ceased to exist under its own limitations.

The inclusion of the general provisions of the 1911 act in the Code of Laws of the United States adopted

in 1926 (Code of the Laws of the U. S., Title 2) does not affect a reenactment of those provisions.

Section 2 (a) of the Act of Congress under which the codification was made (Ch. 712, 44 Stat. 777) provides:

> but nothing in this act shall be construed as repealing or amending any such law, or as enacting as new law any matter contained in the code. In case of any inconsistency arising through omission or otherwise between the provisions of any section of this code and the corresponding portion of legislation heretofore enacted, effect shall be given for all purposes whatsoever to such enactments.

Hence, there exists no congressional regulation which alters the power of the legislature of each State to prescribe in a proper and legal manner the times, places, and manner for holding elections for Representatives in Congress.

The word "legislature" as used in Section 4, Article 1, and other sections of the Federal Constitution has been the subject of judicial construction by State and Federal courts.

In *Minnesota v. Holm* (Minnesota), a recent case, it was construed as meaning the representative body which makes the laws of the State, not synonymous with the lawmaking power of the State and not including constitutional participation by the Governor of that State. Upon this holding an act of the Legislature of Minnesota vetoed by the Governor providing for congressional redistricting was declared valid.

In *State v. Polley* (26 S. D. 5), it was given a contrary construction and there held to include the whole constitutional lawmaking power of the State and subject to the referendum vote of the people and not limited simply to the members who compose the legislature. It was

further held in this case that a State in its sovereign capacity possessed the power to regulate elections therein; that Section 4 of Article 1 of the Federal Constitution was not a grant but a recognition of that power subject, however, to the reservation of a power of Congress to establish regulations in relation to congressional elections and to that extent circumscribing the legislative authority.

In *Hawke v. Smith* (253 U. S. 221) the term "legislature" as used in Article V of the Federal Constitution in respect to the ratification of amendments to the Constitution was held to mean the deliberative representative bodies that make the laws of the people for the respective States, and that the ratification of a proposed amendment to the Federal Constitution by the legislature of a State is not an act of legislation but is the expression of the assent of the State to the proposed amendment.

The opinion of Mr. Justice Day, referring to the meaning of "legislature" as used by the framers of the Constitution in requiring "ratification" of amendments, says:

> That was not a term of uncertain meaning when incorporated in the Constitution. What it meant when adopted it still means for the purpose of interpretation. A legislature was then the representative body which makes the laws of the people. The term is often used in the Constitution with this evident meaning.

These expressions have been seized upon as justification for the exercise by legislatures of an independent power, unlimited by State constitutional requirements, to establish congressional districts in the State. The decision in this case and the expressions of the opinion

may be regarded as the prompting genesis of the concurrent resolution herein involved. At least they are asserted as authority for its validity.

It is significant that the opinion in this case in its reference to the portions of the Federal Constitution, where the term legislature is used with this evident meaning does not include Section 4 of Article I of the Constitution. That a view was entertained that a different meaning should be ascribed to the term as used in Section 4, Article I, is plainly indicated by reference in this opinion to the case of *Davis v. Hildebrandt*, in relation to which it said:

> Article I, Section 4, plainly gives authority to the State to legislate within the limitations therein named. Such legislative action is entirely different from the requirement of the Constitution as to the expression of assent or dissent to a proposed amendment to the Constitution. In such expression no legislative action is authorized or required.

The recognition of the difference in the method of functioning by the legislature where it exercises or did exercise the power of choosing a United States Senator, of ratifying or rejecting a proposed amendment to the Federal Constitution, of being bound by oath to support the Constitution of the United States and that of "prescribing" the districts in a State from which Representatives in Congress shall be elected, is, I believe, the key to correct interpretation. The nature of the function delegated to the legislature for performance affects and determines the methods of its action.

Legislative action has been frequently designated in judicial opinions as "legislative authority," "legislative power," and "the lawmaking power."

A clear distinction exists between action, which in

the very nature of things, must be taken by votes of the members of the legislature, and action taken by legislative authority. In the latter case there must be an exercise of the lawmaking powers and in this State the Governor, as well as members of the legislature, is an essential part of that power.

When the legislature is granted the power to prescribe, it means that the legislature will do so by the exercise of its legislative power and the exercise of that power to be effective must be in accord with all the lawmaking essentials.

In the State of New York, the Governor is an essential factor in the process. Judge Cardozo in the recent case of *Doyle v. Hofstader* (257 N. Y. 244), said:

> The legislature can initiate; but, without the action of the Governor, it is powerless to complete. It is not the sole custodian of legislative power. The power is divided between the legislature and the Governor.

Until this year the settled practice of all the States, so far as research has been able to determine, has been uniform in the method of establishing congressional districts by law enacted in the manner required by the lawmaking process of each State. Such action for nearly a century and a half furnishes a practical construction of the method of performing this function of persuasive, if not controlling and conclusive, weight. Common usage and practice indicating a particular interpretation of a constitution or statute is a great value in determining its real meaning.

> We do not readily overturn the settled practice of the years. (*Story v. Craig*, 231 N. Y. 33.)

> The framers of the Constitution employed words in their natural sense; and, where they are plain

> and clear, resort to collateral aids to interpretation is unnecessary and can not be indulged in to narrow or enlarge the text; but where there is ambiguity or doubt, or where two views may well be entertained, contemporaneous and subsequent practical construction are entitled to the greatest weight. * * * The construction to which we have referred has prevailed too long and been too uniform to justify us in interpreting the language of the Constitution as conveying any other meaning than that heretofore ascribed, and it must be treated as decisive. (*McPherson v. Blacker*, 146 U. S. 27, 36.)

Two views, completely divergent, of the meaning of the term legislature as used in Section 4, Article I, of the Federal Constitution are presented by the decisions of the Supreme Courts of South Dakota and Minnesota. Such a difference of view by high judicial authority opens the door for resort to the uniform practice which has prevailed since the Constitution was established as a guide and authority for decision.

The force of custom, practical construction, and usage should not at this late day yield to judicial interpretation of a term, declared in relation to the performance of a public function, which must, in the very nature of things, be performed by the individual choice and views of the members of the public body to which it is committed, when attempted to be applied to such body in the performance of a task which involves and reflects deliberate action by a State.

The construction of the requirement of the constitional provision in the method of congressional apportionment, as evidenced by the many laws of the States, so long practiced and acquiesced in, should not be upset and governmental processes thrown into confusion be-

cause the executive will not approve a congressional apportionment as enacted by the legislature or the legislature will not enact one which will receive the executive approval.

Order may be entered denying the application for mandamus order, without costs.